110—53

# TRANSCRIPT OF RECORD.

---

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 182.

JOHN E. HOFF, PLAINTIFF IN ERROR,

VS.

THE COUNTY OF JASPER, IN THE STATE OF MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

---

FILED OCTOBER 25, 1880.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1883.

## No. 182.

JOHN E. HOFF, PLAINTIFF IN ERROR,

VS.

THE COUNTY OF JASPER, IN THE STATE OF MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## INDEX.

| | Original. | Print. |
|---|---|---|
| Writ of error | 1 | 1 |
| Return to writ | 2 | 1 |
| Citation | 3 | 2 |
| Acknowledgment of service | 4 | 2 |
| Petition | 5 | 2 |
| Summons | 10 | 6 |
| Marshal's return | 11 | 6 |
| Supplemental petition filed | 12 | 7 |
| Supplemental petition | 12 | 7 |
| Answer filed | 13 | 8 |
| Answer | 13 | 8 |
| Reply filed | 16 | 10 |
| Reply | 16 | 10 |
| Amended answer filed | 16 | 10 |
| Amended answer | 17 | 11 |
| Stipulation as to evidence filed | 21 | 13 |
| Stipulation | 21 | 13 |
| Reply to amended answer filed | 21 | 13 |
| Reply | 21 | 13 |
| Jury waiver filed | 22 | 14 |
| Hearing and submission | 22 | 14 |
| Jury waiver | 22 | 14 |
| Judgment | 23 | 15 |
| Motion for new trial filed | 23 | 15 |
| Motion for new trial | 23 | 15 |
| Motion for new trial overruled | 24 | 16 |
| Finding of facts filed | 24 | 16 |
| Finding of facts | 24 | 16 |
| Writ of error allowed, citation signed, and appeal bond approved | 32 | 20 |
| Appeal bond | 33 | 21 |
| Affidavit | 34 | 22 |
| Certificate of clerk | 35 | 22 |

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the April term, 1880, thereof, between John E. Hoff, plaintiff, and Jasper County, in the State of Missouri, defendant, a manifest error hath happened, to the great damage of the said John E. Hoff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of September, in the year of our Lord one thousand eight hundred and eighty.

Issued at office in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.] H. C. GEISBERG,
*Clerk Circuit Court United States,*
*Western District of Missouri.*

Allowed by—

A. KREKEL, *Judge.*

2 *Return to writ.*

THE UNITED STATES OF AMERICA,
*Eastern Division Western District of Missouri, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at the city of Jefferson, this 13th day of October, A. D. 1880.

[SEAL.] H. C. GEISBERG, *Clerk.*

(Indorsed:) No. 1260. United States circurt court, eastern division western district of Missouri. John E. Hoff vs. Jasper County. Writ of error to the circuit court of the United States for the eastern division of the western district of Missouri. Returned and filed day of , 187 . , clerk.

3 The United States of America to Jasper County, in the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the western district of Missouri, wherein John E. Hoff is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arnold Krekel, judge of the circuit court of the United States for the western district of Missouri, this 25th day of September, in the year of our Lord one thousand eight hundred and eighty.

A. KREKEL, *Judge.*

4 UNITED STATES OF AMERICA,
*Western District of Missouri, ss.*

I hereby acknowledge due service of the within citation this first day of October, A. D. 1880.

E. J. MONTAGUE,
*Attorney for Defendant in Error.*

(Indorsed:) United States circuit court, eastern division, western district of Missouri. John E. Hoff vs. Jasper County. Citation. Filed , 187 . , clerk.

5 UNITED STATES OF AMERICA,
*Eastern Division of the Western District of Missouri, sct:*

Pleas before the honorable circuit court of the United States in and for the eastern division of the western district of Missouri, at the April term, A. D. 1880, in case of John E. Hoff vs. Jasper County, in the State of Missouri. No. 1260.

Be it remembered that heretofore, to wit, on the 18th day of January, A. D. 1879, there was filed in the clerk's office of the circuit court of the United States for the western district of Missouri, in the words and figures following, to wit:

*Petition.*

In the circuit court of the United States for the western district of Missouri, April term, 1879.

JOHN E. HOFF, PLAINTIFF,
*vs.*
JASPER COUNTY, DEFENDANT.

John E. Hoff, plaintiff, who is a citizen of the State of Iowa, complains of Jasper County, defendant, which is a municipal corporation existing under the laws of the State of Missouri, and a citizen thereof, and states

that the defendant heretofore, on the 28th day of March, A. D. 1872, made, executed, and delivered its certain seventy-five negotiable bonds, attested by the defendant, by the presiding justice of the county court of said county under the order of said court signing his name thereto, and by the clerk of said court, and under the order thereof, attesting the same and affixing thereto the seal of said court, which was done at the office of the clerk of said court on the 28th day of March, A. D. 1872, as is by each of said bonds recited; and by each of said bonds defendant acknowledged itself indebted and firmly bound to the Memphis, Carthage & Northwestern Railroad Company or bearer in the sum of five hundred dollars, which sum the defendant for and on account of Marion Township, for value received, thereby promised to pay said company or bearer at the
6 National Park Bank, in the city of New York and State of New
York, twenty years after date, with interest thereon from the date thereof at the rate of ten per cent. per annum, payable semi-annually, on the first day of January and July of each year, on the presentation and delivery at said National Park Bank, in the city of New York and State of New York, *twenty years after date, with interest thereon from the date thereof at the rate of ten per cent. per annum, payable semi-annually, on the first day of January and July of each year, on the presentation and delivery at said National Park Bank, in said city of New York*, of the coupons of interest thereto attached, which bonds were issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the State of Missouri entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township, as is by each of said bonds recited, which said bonds and coupons are designated and numbered consecutively from twenty-four (24) to seventy-eight (78) inclusive, and from eighty-one (81) to one hundred (100) inclusive, and are alike in all respects except as to said numbers; and said bonds and coupons are in form and tenor as follows:

UNITED STATES OF AMERICA, STATE OF MISSOURI.

*Jasper County Bond*, $500.

Interest ten per cent. per annum.

Know all men by these presents that the county of Jasper, in the State of Missouri, acknowledges itself indebted and firmly bound to the Memphis, Carthage and Northwestern Railroad Company or bearer in the sum of five hundred dollars, which sum the *the* said county of Jasper for and on account of Marion Township, for value received, hereby promises to pay said company or bearer at the National Park Bank, in the city of New York and State of New York, twenty years after date, with interest thereon from the date hereof, at the rate of ten per cent. per annum, payable semi-annually, on the first day of January and July of each year, on the presentation and delivery at the said National Park Bank, in said city of
7 New York, of the coupons of interest hereto attached. This bond
is issued pursuant to an order of the county court of said county of Jasper made by authority of an act of the general assembly of the State of

Missouri entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township.

In testimony whereof the said county of Jasper has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing thereto the seal of said court. This done at the office of the clerk of said court this 28th day of March, A. D. 1872.

R. S. MERWIN,
*Presiding Justice of the County Court of Jasper County, Missouri.*

{SEAL OF THE COUNTY COURT OF JASPER COUNTY.}

A. E. GREGORY,
*Clerk of the County Court of Jasper County, Missouri.*

Twenty-five.] *Coupon.* [Twenty-five.

CARTHAGE, JASPER CO., *March 28th*, 1872.

The county of Jasper promises to pay the sum of twenty-five dollars on the first day of July, 1878, being interest on bond No. 100 for $500, payable at the National Park Bank, in the city and State of New York.

A. E. GREGORY,
*Clerk of the County Court Jasper Co., Mo.* Missouri.

And plaintiff states that defendant, for and in behalf of Marion Township, on the 28th day of March, 1872, contracted with said railroad company to subscribe to $75,000 of its capital stock, and did in fact make said subscription on the date last mentioned, by and with the acceptance and consent of said company, to aid it in constructing its railroad into and through said Marion Township, which was done at a term of the county court of Jasper County, Missouri, held on the 28th day of March, 1872, whereat the following among other proceedings was had, to wit:

"In the matter of a subscription to the capital stock of the Memphis, Carthage and Northwestern Railroad Company in behalf of Marion Township.

8 "Whereas it appearing from the returns of an election held in pursuance of an order of this court on Tuesday, the 5th day of March, 1872, that more than two-thirds of the qualified voters of the municipal township of Marion, in Jasper County, Missour*y*, voting at said election are in favor of subscribing to the capital stock of the Memphis, Carthage and Northwestern Railroad Company $75,000 upon the terms and conditions as set forth in the petition heretofore presented and the order of the court made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made:

"Now, therefore, it is ordered by the court that the sum of seventy-five thousand dollars be, and is hereby, subscribed to the capital stock of said railroad company in behalf of said Marion Township according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court and attested by the clerk of this court, with the seal of this court affixed."

And plaintiff states that said order is the order of the county court of defendant referred to and recited in said bonds, and pursuant thereto said bonds were made, issued, and delivered on the 28th day of March, A. D. 1872, as is therein recited, to said railroad company, which sold and transferred them to one Edward Burgess in consideration of value received from him in the construction of the road-bed of said company's railroad into and through said township, and said Burgess subsequently sold and transferred all of said bonds for value in the market in the usual course of trade, and the plaintiff herein is a bona fide holder and owner of said bonds and of the interest coupons attached thereto maturing on and after July 1st, 1875, having purchased the same for value in the usual course of business before their maturity. And plaintiff says that said railroad was in fact constructed forthwith after said subscription by said company into and through said township, and is now in constant operation through the
same, and it is taxed by the defendant; and by the laws of the
9 State of Missouri at the time of said stock subscription, as well as
at the present time, the proceeds of all State and county taxes levied upon the property of said company is required to be applied to the payment of the interest and princip*le* of the said bonds issued by the defendant on account of its subscription to stock as aforesaid.

And plaintiff states that defendant became and was, by virtue of said subscription and payment thereof by said bonds, entitled on 28th day of March, 1872, to a corresponding amount of the capital stock of said company, and in fact received the same and subsequently claimed and exercised the rights of a stockholder for and on behalf of said township and voted said shares of stock on the day of December, 1872, and defendant now still holds and owns said shares.

And plaintiff states that defendant, on the day of June, 1872, made and entered of record an order levying a tax upon said Marion Township to pay the interest of said bonds, and subsequently, on the day of December, 1872, ordered the county treasurer to send the money to pay said interest to the National Park Bank, in the city of New York, and subsequently, on the day of September, 1873, rescinded the last-named order, and further made and entered of record on the 9th day of May, 1873, an order levying a tax upon said Marion Township to pay the interest upon said bonds; and further ordered, on the day of May, 1874, that the tax levied for the year 1874 for railroad purposes upon Marion Township should be applied to the payment of other indebtedness than interest on the bonds hereinbefore mentioned.

And plaintiff states that the eight instalments of semi-annual interest upon said bonds, maturing, respectively, July 1st, 1875, January 1st, 1876, July 1st, 1876, January 1st, 1877, July 1st, 1877, January 1st, 1878, July 1st, 1878, January 1st, 1879, are due and wholly unpaid, and plaintiff, as holder and owner of the said bonds, is entitled thereto, and he hereby tenders to the defendant upon the rendition of judgment therefor the respective coupons, 600 in number, detached from said bonds and representing the same.

And for another and further cause of action plaintiff states that he

is the bona fide holder and owner by purchase for value before
10 maturity of the following interest coupons made, executed, and delivered by the defendant on the 28th day of March, A. D. 1872, attached to the said bonds, and by each of which coupons defendant promises to pay the sum of twenty-five dollars on the respective dates therein stated as interest on said bonds, which coupons are herewith filed and are of the form and tenor hereinbefore stated, and they are as follows:

| | | | | |
|---|---|---|---|---|
| 75 | of No. | 7, | due | July 1st, 1875. |
| 75 | " " | 8, | " | January 1st, 1876. |
| 75 | " " | 9, | " | July 1st, 1876. |
| 75 | " " | 10, | " | January 1st, 1877. |
| 75 | " " | 11, | " | July 1st, 1877. |
| 75 | " " | 12, | " | January 1st, 1878. |
| 75 | " " | 13, | " | July 1st, 1878. |
| 75 | " " | 14, | " | January 1st, 1879. |
| 600 | | | | |

600 coupons in all, which are due and unpaid.

Wherefore plaintiff prays judgement against the defendant Jasper County for the amount of interest above stated, with interest according to the law of the State of New York, at the rate of seven per cent. per annum upon the respective instalments from the dates thereof, with costs, &c., &c., and the plaintiff have execution therefor against property belonging to said Marion Township, and the right to proceedings in mandamus to enforce the payment thereof by taxation against the taxable property of said township.

JOSEPH SHIPPEN, *Pl'ff's Att'y.*

And thereupon there was issued out of said clerk's office on the 21st day of January, 1879, a summons in words and figures following, to wit:

*Summons.*

WESTERN DISTRICT OF MISSOURI, *sct:*

The President of the United States of America to the marshal of the United States for the western district of Missouri, greeting:

You are hereby commanded to summon Jasper County, a munic-
11 ipal corporation and a citizen of the State of Missouri and the western district thereof, to be and appear before the honorable circuit court of the United States in and for the western district of Missouri, on the first day of the next term thereof, to be begun and holden at the city of Jefferson, in said district, on the third Monday, the 21st day of April next, then and there to answer the complaint of John E. Hoff, a citizen of the State of Iowa, as set forth in the petition filed in the office of the clerk of said court on the 18th day of January, A. D. one thousand eight hundred and seventy-nine.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 21st day of January, A. D. eighteen hundred and seventy-nine.

Issued at office, in the city of Jefferson, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] H. C. GEISBERG,
*Clerk of said Court.*

Upon said summons the United States marshal for said district made the following return, to wit:

*Marshal's return.*

UNITED STATES OF AMERICA,
*Western District of Missouri, Eastern Division, sct:*

I do hereby certify that I served the within writ by leaving a certified copy of the same, together with a certified copy of the petition filed in the cause, with George Blakemy, clerk of the county court of Jasper County, Mo., in his office of county clerk in Carthage, in western district of Missouri, Jan'y 24, 1879.

C. C. ALLEN,
*U. S. Marshal Western District of Missouri.*

And afterwards, at the regular stated term of the said circuit court, begun and held on the third Monday of November, 1878, and on the 24th day of March, 1879, it being an adjourned day of said term, the following proceedings were had in this case, to wit:

12 *Suppl. petition filed.*

JOHN E. HOFF
*vs.* } 1260.
JASPER COUNTY.

This day there is received by mail from Joseph Shippen, esq., attorney for plaintiff, and filed herein, plaintiff's supplemental petition.

Which supplemental petition so filed as aforesaid is in words and figures following, to wit:

*Suppl. petition.*

In the U. S. circuit court, western district of Missouri.

JOHN E. HOFF, PLAINTIFF,
*vs:* } No. 1260.
JASPER COUNTY, DEFENDANT.

For supplemental petition plaintiff files pursuant to stipulation, he states that he is the holder for value paid before maturity of the following coupons herewith filed, due and unpaid, detached from bonds like those described in his first petition, except the designating numbers, which are 14, 15, 16, 17, and 18, and said coupons being for $25 each are:

5 of No. 7, due July 1, 1875.

| | | |
|---|---|---|
| 5 | 8, | Jan. 1, 1876. |
| 5 | 9, | July 1, 1876. |
| 5 | 10, | Jan. 1, 1877. |
| 5 | 11, | July 1, 1877. |
| 5 | 12, | Jan. 1, 1878. |
| 5 | 13, | July 1, 1878. |
| 5 | 14, | Jan. 1, 1879. |

Wherefore plaintiff prays judgment for the aggregate amount of all coupons filed in this suit, with interest & costs, &c., as heretofore prayed.

JOSEPH SHIPPEN.

And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of April, 1879, at the place aforesaid, the following further proceedings were had in this case on the 21st day of April, 1879, to wit:

13 *Answer filed.*

John E. Hoff
*vs.*
Jasper County.

This day comes the defendant by E. J. Montague, esq., its attorney, and files answer herein.

Which answer so filed as aforesaid is in words and figures following, to wit:

*Answer.*

In U. S. circuit, western dist. Mo.

John E. Hoff, plaintiff,
*vs.*
Jasper County, defendant.

Defendant, for answer herein, denies that on the 28th day of March, 1872, this defendant made, executed, and delivered seventy-five or any other number of negotiable bonds, and denies that said bonds mentioned by plaintiff were issued by authority of the county court of defendant; and defendant denies that the making and attestation of said bonds were not done on the 28th day of March, 1872, or at the office of the county clerk of Jasper County; and defendant denies that by said bonds, or by any one of said bonds, this defendant became indebted to the Memphis, Carthage, and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, or in any other sum, for and on account of Marion Township; and defendant denies that said bonds and coupons were issued pursuant to an order of the county court of said Jasper County; denies that said bonds were issued by a vote of more than two-thirds of the voters of said township; and defendant denies that the copies of the said bonds and coupons set forth in plaintiff's petition are not true and correct copies of the bonds and coupons mentioned by plaintiff.

And defendant denies that on the 28th day of March defendant con-

tracted with said railroad company to subscribe for seventy-five thousand dollars of the capital stock of said railroad company, with the consent
14 and acceptance of said company; and defendant denies that the said bonds and coupons were made and delivered on the 28th day of March, 1872, as charged to be recited in said bonds; and defendant denies that said railroad company sold and transferred said bonds and coupons to Edward Burgess; denies that said Burgess sold said bonds in the open market for value in the usual course of trade; denies that plaintiff is a bona fide holder and owner of said bonds, and denies that plaintiff purchased the said coupons for value in the usual course of business before their maturity.

And defendant denies that said railroad was forthwith constructed after making the said supposed contract of subscription to the capital stock of said company; denies that said railroad company ever constructed any railroad into or through said Marion Township after the 28th day of March, 1872; denies that said railroad company is now, or that it has been for the last five years, operating any railroad in said township, or in said county, and denies that any property of said company is taxed in said county; and defendant states that said railroad company ceased to exist about five years ago, since which time no property or assetts belonging to said company has been found in Jasper County.

And defendant denies that by said contract of subscription defendant became entitled to and received any shares of the capital stock of said railroad company; and defendant denies that it ever claimed or exercised the right of a stockholder in said railroad company under said contract of subscription; and defendant denies that it now holds or owns, or that it did hold or own, any share or shares of the capital stock of said railroad company by virtue of any contract of subscription made on the 28th day of March, 1872.

15 And defendant denies that on the day of June, 1872, or at any other time, this defendant levied a tax by an order of record to pay the interest on said bonds upon said Marion Township; and defendant denies that on the day of December, 1872, or at any other time, this defendant ordered the treasurer of said county to send money to the National Park Bank, in the city of New York, to pay the interest on said bonds; and defendant denies that in the year 1873, or in the year 1874, or at any other time, this defendant levied a tax to pay interest on said bonds; and defendant denies that any installments of said coupons are due, or that plaintiff is the owner and holder of the same.

And for answer to the second count in plaintiff's petition defendant denies that plaintiff is the bona fide holder and owner of said coupons in said second count mentioned. And for further answer and defense defendant states the facts to be that in the month of October, 1872, R. S. Merwin, who was one of the judges of said county court, and A. E. Gregory, who was clerk of said court, made the bonds and coupons in plaintiff's petition described, and that in the month of November, 1872, delivered said bonds to said railroad company; that at the time of the making and delivering of said bonds as aforesaid the same were not dated, and that since the making and delivery of said bonds the same have been dated by some person to defendant unknown, and made to bear date March 28, 1872; that said bonds have been so antidated to evade the statute which required such bonds to be registered in the auditor's office before acquiring validity or negotiability; and defendant states that at the time of the making and delivery of said bonds as aforesaid the said railroad company had 16 not complied with or performed any part of the terms and conditions upon which said subscription of stock had been made, and that said bonds were not entitled to registration; and defendant avers that said railroad company has not yet complied with the terms and conditions upon which said subscription was made, and that said bonds and coupons were issued by said Merwin and Gregory without authority of the said county court, and without the knowledge of the other members of said court.

Wherefore defendant prays to be discharged with judgment for costs.

E. J. MONTAGUE,
*Att'y for Def't.*

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 22d day of April, 1879, to wit:

*Reply filed.*

JOHN E. HOFF
*vs.*
JASPER COUNTY.

This day comes the plaintiff, by Joseph Shippen, esq., attorney for plaintiff, and files reply to defendant's answer herein.

*Reply.*

In the circuit court of the United States for the western district of Missouri.

JOHN E. HOFF
*vs.* No. 1260.
JASPER COUNTY.

Plaintiff for reply to defendant's answer herein denies generally each and all the material affirmative allegations thereof.

JOSEPH SHIPPEN, *Pl'ff's Att'y.*

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 24th day of April, 1879, to wit:

*Amended ans. filed.*

JOHN E. HOFF
*vs.*
JASPER COUNTY.

17 *Amended answer filed.*

This day comes the defendant, by E. J. Montague, esq., its attorney, and files an amended answer herein.

Which amended answer so filed as aforesaid is in words and figures following, to wit:

*Amended answer.*

In the U. S. C. C.

JOHN E. HOFF, PLAINTIFF,
*vs.* No. 1260.
JASPER COUNTY, DEFENDANT.

Defendant, for an amended answer herein, denies that on the 28th day of March, 1872, this defendant made, executed, and delivered the bonds mentioned in plaintiff's petition, and denies that said bonds were issued by authority of the county court of defendant, and denies that the making and attestation of said bonds were done on the 28th day of March, 1872, at the office of the clerk of the county court of Jasper County, and denies that by said bonds this defendant became indebted to the Memphis, Carthage & Northwestern Railroad Company, or bearer, in the sum of $500, or any other sum, for and on account of Marion Township; denies that said bonds and coupons were issued pursuant to an order of the county court of said county; denies that said bonds were issued by a vote of more than two-thirds of the voters of said township; and defendant denies that the copies set on plaintiff's petition are true and correct copies of the bonds and coupons mentioned by plaintiff; and defendant denies that on the 28th March, 1872, this defendant contracted with said railroad company to subscribe for $75,000 of the capital stock of said railroad company, with the consent and acceptance of said company; denies that the said bonds and coupons were made and delivered on the 28th March, 1872, as charged to be recited in said bonds; denies that said railroad company sold and transferred said bonds and coupons to Edward Burgess; denies that said Burgess sold said bonds in the open market for value in the usual course of trade; denies that plaintiff is a bona fide holder and owner 18 of said bonds, and denies that said plaintiff purchased said coupons for value in the usual course of trade before the maturity; and defendant denies that said railroad was forthwith constructed after the time of the alleged making of said supposed contract of subscription to the capital stock of said company; denies that said railroad company constructed any railroad into or through said township after the 28th March, 1872; denies that said company is now or that it has for the last five years been operating any railroad in said township; denies that any property of said company is taxed, or that said company pays taxes on any property in said county; and defendant avers that said company ceased to exist about five years ago, since which time no property or assets belonging to said company have been found in Jasper County; and defendant denies that by said supposed contract of subscription defendant became entitled to receive any shares of the capital stock of said company; denies that defendant ever claimed or exercised the right of stockholder in said company under said constract of subscription; denies that it now holds or owns, or that it ever held or owned, any share of stock of said company by virtue of any contract of subscription made on the 28th March, 1872, or at any subsequent time.

And defendant denies that on the day of June, 1872, or at any other time, this defendant levied a tax by an order of record upon Marion Township to pay the interest on said bonds; denies that on the day of December, 1872, or at any other time, this defendant ordered the treasurer of said county to send money to the National Park Bank, in the city
of New York, to pay the interest on said bonds; denies that
19 in the year 1873, or at any other time, defendant levied a tax to
pay the interest on said bonds; and defendant denies that any installments of interest are now due, and denies that plaintiff is the owner and holder of said coupons.

And, for further answer and defense, defendant states the facts to be that in the month of October, 1872, R. S. Merwin, who was one of the judges of said county court, and A. E. Gregory, who was clerk of said court, made the bonds and coupons in the plaintiff's petition specified, and that by some means unknown to defendant said bonds and coupons got into the hands of one Edward Burgess and one Wm. C. Wilson, and at the time of the making of said bonds as aforesaid the said Merwin was not presiding justice of said county court, and there was no order of record authorizing the said Merwin and Gregory to make and issue said bonds, and that at the time of the making of said bonds in October, 1870, they were not dated, and that blanks were left for the dates of the bonds and coupons to be filled up with the day and year when, if ever, the said railroad company should complete its road to a point on the Missouri River, Fort Scott and Gulf road, in the State of Kansas, and should commence running trains regularly for the transportation of freight and passengers from said point to Pierce City, in Lawrence County, Mo.; and that after said bonds and coupons left the hands of said Merwin and Gregory the blanks of the dates were filled up, and the bonds and coupons were made to bear date the 28th day of March, 1872. That at the time of the mak-
ing of said bonds and coupons in October, 1872, as aforesaid, the
20 said railroad company had not complied with nor performed the
terms and conditions upon which said county court was authorized to issue said bonds to said company; that said company never did comply with and perform said terms and conditions, and that said company has ceased to exist and do business.

And defendant states that at the time of the making of said bonds and coupons as above stated they were not entitled to registration in the office of the State auditor by reason of the failure of said company to comply with said terms and conditions, and that said bonds and coupons have never been registered in the office of the State auditor, and defendant avers that said bonds were antedated and made to bear date on the 28th March, 1872, in order to evade the statute requiring registration, which went into effect on the 30th day of March, 1872. And defendant avers that the antedating of said bond and coupons as aforesaid was without the knowledge or consent of defendant, and that the said antedating was a material alteration of said bonds and coupons.

Wherefore defendant prays to go hence without day, and have judgment for costs.

E. J. MONTAGUE,
*Attorney for Defendant.*

A correct copy of the original amended answer filed in this cause. I consent that this copy may be used in place of said answer.

E. J. MONTAGUE,
*Att'y for Def't.*

21 And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 25th day of April, 1879.

*Stip. as to evidence filed.*

JOHN E. HOFF
vs. } 1260.
JASPER COUNTY.

This day come the parties by their attorneys and file a stipulation as to evidence to be used on the trial of this cause.

Which stipulation so filed as aforesaid is in words and figures following, to wit:

*Stipulation.*

JOHN E. HOFF, PL'FF,
vs. } No. 1260.
JASPER COUNTY, DEF'T.

It is hereby agreed in this case that in the trial thereof either party may use in evidence all depositions and records of the county court of Jasper County which were used in the trial of the case of Charles E. Anthony vs. Jasper County, tried in this court at the April term, 1876, subject, however, to all legal objections on account of relevancy, competency, and materiality.

JOSEPH SHIPPEN,
*Plaintiff's Att'y.*
E. J. MONTAGUE,
*Att'y for Def't.*

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 30th day of April, 1879, to wit:

*Reply filed.*

JOHN E. HOFF
vs. } 1260.
JASPER COUNTY.

This day comes the plaintiff and files a reply to the amended answer herein.

Which reply so filed as aforesaid is in words and figures following, to wit:

*Reply.*

22 In the United States circuit court for the western district of Missouri.

JOHN E. HOFF
*vs.*
JASPER COUNTY. } No. 1260.

For reply to defendant's amended answer plaintiff denies generally each and all the material allegations thereof.

JOSEPH SHIPPEN, *Pl'ff's Att'y.*

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 3d day of May, A. D. 1879, to wit:

*Jury waiver filed.*

JOHN E. HOFF
*vs.*
JASPER COUNTY. } 1260.

This day come the parties by their attorneys, the plaintiff by Joseph Shippen, esq., and the defendant by E. J. Montague, esq., and a stipulation having been filed waiving a jury herein this case is tried by the court sitting as a jury.

*Hearing & submission.*

Whereupon evidence is heard and this case argued by counsel, and submitted, and by the court taken under advisement, briefs to be filed herein by June 15, 1879.

Which jury waiver so filed as aforesaid is in words and figures following, to wit:

*Jury waiver.*

In the circuit court of the United States for the western district of Missouri.

JOHN E. HOFF
*vs.*
JASPER COUNTY. } No. 1260.

MARION T'P, *May* 3, 1879.

It is hereby stipulated and agreed by and between the above parties that the trial by jury be and hereby is waived.

JOSEPH SHIPPEN,
*Pl'ff's Att'y.*
E. J. MONTAGUE,
*Def't's Att'y.*

And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of April, 1879, and on the 12th day
23 of September, 1879, it being an adjourned day of said term, the following further proceedings were had in this case, to wit:

*Judgment.*

JOHN E. HOFF
*vs.*
JASPER COUNTY.
} 1260.

This cause having been heretofore submitted to the court upon the pleadings, agreements, and proof, and by the court taken under advisement, on consideration whereof, and being fully advised in the premises finds the issues joined for the defendant, it is therefore considered by the court that the plaintiff take nothing by his writ herein, and that the defendant go hence without day, and recover from the plaintiff its costs and charges herein expended and have execution therefor.

And afterwards, on the 7th day of October, 1879, it being in vacation of said circuit court, the following further proceedings were had in this case, to wit:

*Mo. for new trial filed.*

JOHN E. HOFF
*vs.*
JASPER COUNTY.
} 1260.

This day there is received from Joseph Shippen, esq., attorney for plaintiff, and filed herein, motion for new trial.

Which motion for new trial so filed as aforesaid is in words and figures following, to wit:

*Motion for new trial.*

In the U. S. circuit court, western district of Missouri, eastern division.

JOHN E. HOFF
*vs.*
JASPER COUNTY.
} No. 1260.

Plaintiff moves the court to set aside the judgment rendered at this term herein and grant a new trial on the grounds:

1st. That upon the pleadings and evidence the judgment for defendant was erroneous and the same should have been for the plantiff.

24 2d. That no special findings of fact have been made and entered of record as prayed by the plaintiff upon which the case can be reviewed in the U. S. Supreme Court.

3d. That error was committed on the trial in the improper admission of testimony irrelevant and incompetent on behalf of defendant.

JOSEPH SHIPPEN,
*Pl'ff's Att'y.*

And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of April, 1880, and on the 11th day of September, 1880, it being an adjourned day of said term, the following further proceedings were had in this case, to wit:

*Mo. for new trial overruled.*

JOHN E. HOFF
*vs.* } 1260.
JASPER COUNTY.

This day comes the plaintiff by Joseph Shippen, esq., his attorney; thereupon the motion for new trial heretofore filed herein is submitted to the court, on consideration whereof it is ordered that said motion be overruled.

*Finding of facts filed.*

Whereupon the court returns a special finding of facts, which is filed and ordered to be made part of the record herein.

Which finding of facts so filed as *a* aforesaid is in words and figures following, to wit:

*Finding of facts.*

In the circuit court of the United States for the western district of Missouri, eastern division.

JOHN E. HOFF
*vs.* } No. 1260.
JASPER COUNTY.

And now at this day the court overrules the motion of plaintiff for a new trial herein, and makes and orders to be entered of record the following special findings of facts:

25 I. The county court of Jasper County made and entered of record the following orders as of the several dates indicated:

*Order of the court, March 28th,* 1872.

In the matter of a subscription to the capital stock of the Memphis, Carthage and Northwestern Railroad Company in behalf of Marion Township.

Whereas it appearing from the returns of an election held in pursuance of an order of this court on Tuesday, the 5th day of March, A. D. 1872, that more than two-thirds of the qualified voters of the municipal township of Marion, in Jasper County, Missouri, voting at said election are in favor of subscribing to the capital stock of the Memphis, Carthage and Northwestern Railroad Company seventy-five thousand dollars, upon the terms and conditions as set forth in the petition heretofore presented and the order of this court made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made:

And wherefore it is ordered by the court that the sum of seventy-five thousand dollars be, and is hereby, subscribed to the capital stock of said railroad company in behalf of said Marion Township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court, and *and* attested by the clerk of this court, with the seal of this court affixed.

*Order of the court, June 6th*, 1872.

Ordered by the court that for the purpose of defraying the expense of the county for the year 1872, building bridges that are absolutely neces-
sary, and meeting the payment of the interest on the bonds issued
26 in behalf of the county and certain townships, a tax be levied upon
all property and licenses made taxable by law for State purposes,
except the property exempt by "An act concerning the assessment and collection of the revenue," approved March 30th, 1872, as follows, viz:

County revenue, $\frac{1}{2}$ of one per cent.
Road tax, $\frac{1}{10}$ of one per cent.
Poor tax, $\frac{1}{5}$ of one per cent.
Bridge tax, $\frac{1}{10}$ of one per cent.
Jail tax, $\frac{1}{20}$ of one per cent.

And upon the taxable property of the municipal townships of Sarcoxie, Marion, and Mineral, including all territory and property belonging to said townships on the 1st day of September, A. D. 1871, for railroad purposes, $1\frac{1}{4}$ of one per cent.

*Order of the court, December 30th*, 1872.

Ordered by the court that the National Park Bank of New York be, and is hereby appointed the agent of Jasper County, Missouri, to pay the interest accruing on the railroad bonds issued by the county court of said county on behalf of the several townships in the county; and that the county treasurer forward to said bank interest paid over to him by the county collector, and due upon said bonds, according to the terms of the various subscriptions.

FEBRUARY 6TH, 1873.

Ordered by the court that R. S. Merwin, presiding justice of this court, place in the custody of Richard S. Griffith, treasurer of the county, the coupons detached from the last fifty thousand dollars of bonds voted by the inhabitants of the township of Marion, in the county of Jasper, to the Memphis, Carthage & Northwestern Railroad Company, the said
coupons to be held by said treasurer until further orders of this
27 court, Judge Koontz protesting against the order.

MAY 9TH, 1873.

Ordered by the court that for the purpose of meeting the payment of the interest of the railroad bonds issued by the townships of Marion, Sarcoxie, and Mineral, and to provide for the sinking fund mentioned in in the order of subscription, a tax be levied upon the taxable property of such townships, including all statements of merchants doing business within such townships, as follows: On the taxable property of Marion township, including merchants' statements, one per cent; on the taxable property of Sarcoxie Township, including merchants' statements, one and one-quarter per cent.; on the taxable property of Mineral Township, including merchants' statements, one and three-quarters per cent.

SEPTEMBER 11TH, 1873.

Ordered by the court that so much of the order of this court made at the November adjourned term, on the 30th of December, 1872, as relates to the payment of the interest accruing on the bonds issued on behalf of Marion Township to the Memphis, Carthage & Northwestern Railroad Company, for seventy-five thousand dollars, ordered to issue on the 28th of March, 1872, be set aside and annulled, and the agency of the National Park Bank to pay the interest on said last-mentioned bonds be revoked.

JUNE 6TH, 1874.

Ordered by the court that for the purpose of defraying the expenses of the county for the year 1874 a tax be levied upon all property and licenses made taxable by law, as follows, to wit:

For county revenue purposes, $\frac{1}{2}$ of one per cent.
For poor tax, $\frac{1}{10}$ of one per cent.
28 For jail tax, $\frac{1}{40}$ of one per cent.
For interest on Sarcoxie Township railroad bonds, $1\frac{1}{4}$ of one per cent.; for interest on Marion Township railroad bonds, $\frac{4}{10}$ of one per cent.

II. March 28, 1872, the county court of Jasper County, pursuant to the general statute of the State of Missouri entitled "An act to facilitate the construction of railroads in the State of Missouri," approved March 23, 1868, and pursuant to the vote of two-thirds of the qualified voters of said Marion Township assenting thereto, at a special election, subscribed to $75,000 of the capital stock of the Memphis, Carthage and Northwestern Railroad Company, a corporation organized and existing under and in pursuance of the general statutes of the State of Missouri, and said corporation accepted said subscription of stock then and there, by its terms payable in the bonds of said township, and by virtue of said subscription and a prior subscription caused said township to be and appear upon its stock-transfer book as the holder and owner of 1,000 shares of stock, amounting in the aggregate to $100,000, which it still continues to hold.

III. That bonds in payment of such stock subscription to the amount of $50,000 were made and delivered, without being registered, of form and tenor following:

UNITED STATES OF AMERICA, STATE OF MISSOURI.

*Jasper County bond.* [$500.

Interest, ten per cent. per annum.

Know all men by these presents that the county of Jasper, in the State

of Missouri, acknowledges itself indebted and firmly bound to the Memphis, Carthage & Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, which sum the county of Jasper, for
29 . and on account of Marion Township, for value received, hereby promises to pay said company, or bearer, at the National Park Bank, in the city of New York and State of New York, twenty years after date with interest thereon from the date hereof at the rate of ten per cent. per annum, payable semi-annually, on the 1st day of January and July of each year, on the presentation and delivery at said National Park Bank in said city of New York of the coupons of interest hereto attached.

This bond is issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the State of Missouri entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township.

In testimony whereof the said county of Jasper has executed this bond, by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same, and affixing thereto the seal of said court. This done at the office of the clerk of said court this 28th day of March, A. D. 1872.

[SEAL.] R. S. MERWIN,
*Presiding Justice of the County Court of Jasper County, Missouri.*

A. E. GREGORY,
*Clerk of the County Court of Jasper County, Missouri.*

Twenty-five.] [Twenty-five.

CARTHAGE, JASPER CO., *March* 28, 1872.

The county of Jasper promises to pay the sum of twenty-five dollars on the first day of January, 1878, being interest on bond No. 33 for $500, payable at the National Park Bank in the city and State
30 of New York.

A. E. GREGORY,
*Clerk of the County Court, Jasper Co., Mo.—Missouri.*

IV. That said bonds were in fact signed by the presiding justice and clerk of the county court of Jasper County, and attested with its corporate seal, on or about the day of October, 1872, and were not registered by the auditor of the State of Missouri.

V. That on the 28' day of March, 1872, John Purcell was the presiding justice of said county court, and R. S. Merwin was one of the associate justices, but in October, 1872, prior to the execution of said bonds, said Merwin had become the presiding justice of said court.

VI. That the line of railroad of the Memphis, Carthage and Northwestern Railroad Company from Pierce City, in Lawrence County, Missouri, through the county of Jasper and said Marion Township, into the State of Kansas, extending to the town of Oswego, had been constructed prior to the bringing of this suit, and is now in constant operation.

VII. That the bonds in controversy, of form aforesaid, were sealed with

the seal of the county court of Jasper County, affixed by the clerk, and signed by the clerk, and by R. S. Merwin, presiding justice of said court, and were delivered in October, 1872, to the Union Savings Association of St. Louis, for the use of one Edward Burgess, a contractor for the building of the railroad named in the bonds, having first removed the first two coupons, and from said Burgess said bonds were purchased by one William C. Wilson, at the rate of fifty-five cents on the dollar, which was then the market value of said bonds, and the same were paid for in November, 1872, by the said Wilson giving his check to Burgess for the
31 amount ($27,500) which was paid.

VIII. That the county court of Jasper County levied and caused to be collected taxes on the taxable property of Marion Township in the years 1872, 1873, and 1874 to pay the interest on its railroad indebtedness, including the bonds here in controversy; that said county court appointed an agent in New York City to pay the interest on said bonds, and directed its treasurer to forward the funds therefor, and subsequently revoked the authority of said agent as to the bonds here in controversy; and that said county court ordered R. S. Merwin, its presiding justice, to deliver the coupons detached from the bonds here in controversy to the treasurer, with directions for them to be held until further orders.

IX. That the county of Jasper, for Marion Township, had issued a set of $50,000 bonds, bearing eight per cent. interest per annum, dated November 1, 1871, prior to those here in controversy; that the clerk of the county court of Jasper County wrote and addressed the following letter:

OFFICE OF THE COUNTY CLERK, JASPER COUNTY,
*Carthage, Mo., Nov. 3d*, 1872.

T. S. RUTHERFORD,
*President Union Savings Association, St. Louis, Mo.:*

DEAR SIR: Your letter of October 31 is just received. If the interest due on the Marion Township bonds could be put off about one month longer all would be right; we have levied $16,000 to meet the interest on those bonds and the second issue, which is now being collected, and of course you understand the law governing the collection of taxes. I will, however, present your letter to the court this week, and endeavor to have some arrangement made for sending the money to New York.

32 Yours, very truly,
A. E. GREGORY, *Clerk*.

Rec'd Nov. 5.

That William C. Wilson was shown said letter prior to his said purchase of said bonds.

X. That the plaintiff is a bona fide holder for value paid before maturity, at their market value, of the bonds and coupons here in controversy, without any knowledge of the alleged defects or infirmities other than such as is implied by law.

And upon the above statement of facts the court declares the law to be with the defendant, and orders final judgment for the defendant herein, to which ruling of law the plaintiff now excepts.

Done this 11th day of September, 1880.

(Signed) A. KREKEL, *Judge*.

And afterwards, on the 25th day of September, A. D. 1880, at chambers, before the honorable Arnold Krekel, judge, the following further proceedings were had in this case, to wit:

*Writ of error allowed, citation signed, & appeal bond approved.*

JOHN E. HOFF
*vs.*
JASPER COUNTY. } 1260.

This day there is presented to the honorable Arnold Krekel, judge, at chambers, a writ of error to reverse the judgment heretofore entered in the above cause, a citation directed to the said defendant, and an appeal bond in the sum of five hundred dollars; whereupon said writ of error is allowed, said citation signed, and appeal bond approved and ordered to be made part of the record herein.

Which appeal bond so filed as aforesaid is in words and figures following, to wit:

33 *Appeal bond.*

Know all men by these presents, that we, John E. Hoff, as principal, and William C. Wilson, as surety, are held and firmly bound unto Jasper County, Missouri, in the full and just sum of five hundred dollars, to be paid to the said Jasper County, Missouri, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of September in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at the April term, A. D. 1880, of the circuit court of the United States for the western district of Missouri, in a suit depending in said court between said John E. Hoff, plaintiff, and Jasper County, defendant, judgment was rendered against the said John E. Hoff, and the said John E. Hoff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Jasper County citing and admonishing it to be and appear at the Supreme Court of the United States to be held at Washington, D. C., on the Monday of next:

Now, the condition of the above obligation is such that if the said John E. Hoff shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

JOHN E. HOFF. [SEAL.]
WM. C. WILSON. [SEAL.]

Sealed and delivered in presence of—
ALEX'R D. WILSON.

Approved by—

A. KREKEL, *Judge.*

34 *Aff't of notary.*

UNITED STATES OF AMERICA:
*State of Missouri, City of St. Louis, sct:*

Before me, a notary public in and for said city, personally appeared William C. Wilson, to me well known, who upon oath state' that he is worth over and above his indebtedness the sum of two thousand dollars, and that he owns real property to that amount subject to execution in the State of Missouri.

WM. C. WILSON.

Subscribed and sworn to before me this eighteenth day of September, 1880.

My term of office expires April 19, 1882.

[SEAL.] HENRY WAUFFELD,
*Notary Public.*

35 UNITED STATES OF AMERICA,
*Eastern Division Western District of Missouri, sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said district, do hereby certify that the foregoing writing is a true transcript of the record and proceedings in the case wherein John E. Hoff is plaintiff and Jasper County, Missouri, is defendant, as fully as the same remains on file & of record in my office.

Witness my hand as clerk and the seal of said court. Done at office, in the city of Jefferson, this thirteenth day of October, 1880.

[SEAL.] H. C. GEISBERG, *Clerk.*

(Indorsed:) Case No. . U. S. circuit court, western district of Missouri. vs. . Duly certified copy of the in the above-entitled cause.

(Indorsement on cover:) No. 182. John E. Hoff, plaintiff in error, vs. The County of Jasper, in the State of Missouri. W. Missouri C. C. U. S. Filed 25th October, 1880.

110-553

OFFICE SUPREME COURT U.S.
FILED
DEC 13 1883
JAMES H. McKENNEY, Clerk.

---

# Supreme Court of the United States,

OCTOBER TERM, 1883.

## No. 182.

JOHN E. HOFF, *Plaintiff in Error*,
*vs.*
THE COUNTY OF JASPER, IN THE STATE OF MISSOURI, *Defendant in Error*.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

JAMES S. BOTSFORD,
MARCUS T. C. WILLIAMS,
For the Plaintiff in Error.

H. N. FAREY & CO. PRINTERS, JOURNAL BUILDING, KANSAS CITY.

# Supreme Court of the United States,

OCTOBER TERM, 1883.

## No. 182.

JOHN E. HOFF, *Plaintiff in Error*,
*vs.*
THE COUNTY OF JASPER, IN THE STATE OF MISSOURI, *Defendant in Error*.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

## STATEMENT.

This is a suit brought in the court below by plaintiff in error, a citizen of the State of Iowa, against the county of Jasper, which is a county in, and a municipal corporation created under the laws of, said State of Missouri, to recover the amount of twelve hundred and forty coupons for the sum of twenty-five dollars each, amounting in all to thirty-one thousand dollars, which coupons were detached from bonds issued by said county for and on behalf of Marion township therein, in payment of a subscription by said county for said township to the stock of the Memphis, Carthage & Northwestern Railroad Company.

The petition was in the usual form, and contained all the averments necessary in this class of cases, and there was an answer filed by the defendant, putting in issue the averments of the petition, and a replication to the answer was filed by the plaintiff. (Pages 2 to 14, Printed Record.)

The case was tried by the court on a written stipulation, signed by the parties, waiving a jury, and the court, after hearing the evidence and arguments of counsel, made and entered of record a special finding of facts, in words and figures as follows:

## FINDING OF FACTS.

### I.

The county court of Jasper county made and entered of record the following orders as of the several dates indicated:

ORDER OF THE COURT, March 28th, 1872.

In the matter of a subscription to the capital stock of the Memphis, Carthage & Northwestern Railroad Company in behalf of Marion township:

Whereas, it appearing from the returns of an election held in pursuance of an order of this court on Tuesday, the 5th day of March, A. D. 1872, that more than two-thirds of the qualified voters of the municipal township of Marion, in Jasper county, Missouri, voting at said election are in favor of subscribing to the capital stock of the Memphis, Carthage & Northwestern Railroad Company seventy-five thousand dollars, upon the terms and conditions as set forth in the petition heretofore presented and the order of this court made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made: And wherefore it is ordered by the court that the sum of seventy-five thousand dollars be and is hereby subscribed to the capital stock of said railroad company in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court and attested by the clerk of this court, with the seal of this court affixed.

ORDER OF THE COURT, June 6th, 1872.

Ordered by the court, that for the purpose of defraying the expense of the county for the year 1872, building bridges that are absolutely necessary, and meeting the payment of the interest on the bonds issued in behalf of the county and certain townships, a tax be levied upon all property and licenses made taxable by law, for State purposes, except the property exempt by "An act concerning the assessment and collection of the revenue," approved March 30th, 1872, as follows, viz:

County revenue, ½ of one per cent.
Road tax, 1-10th of one per cent.
Poor tax, 1-5th of one per cent.
Bridge tax, 1-10th of one per cent.
Jail tax, 1-20th of one per cent.

And upon the taxable property of the municipal townships of Sarcoxie, Marion and Mineral, including all territory and property belonging to said townships on the 1st day of September, A. D. 1871, for railroad purposes, 1¼ of one per cent.

ORDER OF THE COURT, December 30th, 1872.

Ordered by the court, that the National Park

Bank, of New York, be and is hereby appointed the agent of Jasper county, Missouri, to pay the interest accruing on the railroad bonds issued by the county court of said county on behalf of the several townships in the county, and that the county treasurer forward to said bank interest paid over to him by the county collector, and due upon said bonds,. according to the terms of the various subscriptions.

February 6th, 1873.

Ordered by the court, that R. S. Merwin, presiding justice of this court, place in the custody of Richard S. Griffith, treasurer of the county, the coupons detached from the last fifty thousand dollars of bonds voted by the inhabitants of the township of Marion, in the county of Jasper, to the Memphis, Carthage & Northwestern Railroad Company, the said coupons to be held by said Treasurer until further orders of this court. Judge Koontz protesting against the order.

May 9th, 1873.

Ordered by the court, that for the purpose of meeting the payment of the interest of the railroad bonds issued by the townships of Marion, Sarcoxie and Mineral, and to provide for the sinking fund mentioned in the order of subscription, a tax be levied upon the taxable property of such townships, including all statements of merchants doing business within such townships, as follows: On the taxable property of Marion township, including merchants' statements, one per cent. On the taxable property of Sarcoxie township, including merchants' statements, one and one-quarter per cent. On the taxable property of Mineral township, including merchants' statements, one and three-quarters per cent.

September 11th, 1873.

Ordered by the court, that so much of the order of this court made at the November adjourned term, on the 30th of December, 1872, as relates to the payment of the interest accruing on the bonds issued on behalf of Marion township, to the Memphis, Carthage & Northwestern Railroad Company, for seventy-five thousand dollars, ordered to issue on the 28th of March, 1872, be set aside and annulled, and the agency of the National Park Bank to pay the interest on said last mentioned bonds be revoked.

June 6th, 1874.

Ordered by the court, that for the purpose of defraying the expenses of the county for the year 1874, a tax be levied upon all property and licenses made taxable by law, as follows, to-wit:

For county revenue purposes, ½ of one per cent.

For poor tax, 1-10th of one per cent.

For jail tax, 1-40th of one per cent.

For interest on Sarcoxie township railroad bonds, 1¼ of one per cent.

For interest on Marion township railroad bonds, 4-10ths of one per cent.

## II.

March 28th, 1872, the county court of Jasper county, pursuant to the general statute of the State of Missouri entitled "An act to facilitate the construction of railroads in the State of Missouri," approved March 23d, 1868, and pursuant to the vote of two-thirds of the qualified voters of said Marion township assenting thereto at a special election, subscribed to $75,000 of the capital stock of the Memphis, Carthage & Northwestern Railroad Company, a corporation organized and existing under and in pursuance of the general statutes of the State of Missouri, and said corporation accepted said subscription of stock then and there, by its terms payable in the bonds of said township, and by virtue of said subscription and a prior subscription caused said township to be and appear upon its stock transfer book as the holder and owner of 1,000 shares of stock, amounting in the aggregate to $100,000, which it still continues to hold.

## III.

That bonds in payment of such stock subscription to the amount of $50,000 were made and delivered without being registered, of form and tenor following:

UNITED STATES OF AMERICA; STATE OF MISSOURI.

### JASPER COUNTY BOND.

Interest, ten per cent per annum. $500.

Know all men by these presents, that the county of Jasper, in the State of Missouri, acknowledges itself indebted and firmly bound to the Memphis, Carthage & Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, which sum the county of Jasper, for and on account of Marion township, for value received, hereby promises to pay said company, or bearer, at the National Park Bank, in the City of New York, and State of New York, twenty years after date, with interest thereon from the date hereof at the rate of ten per cent per annum, payable semi-annually, on the 1st day of January and July of each year, on the presentation and delivery at said National Park Bank, in said City of New York, of the coupons of interest hereto attached.

This bond is issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the State of Missouri entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township.

In testimony whereof the said county of Jasper has executed this bond by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court. This done at the office of the clerk of said court this 28th day of March, A. D. 1872.

R. S. MERWIN,
Presiding Justice of the County Court of Jasper County, Mo.

[SEAL.]

A. E. GREGORY,
Clerk of the County Court of Jasper County, Mo.

CARTHAGE,
Twenty-Five. JASPER CO., MARCH 28th, 1872. Twenty-Five.

The county of Jasper promises to pay the sum of twenty-five dollars on the 1st day of January, 1878, being interest on bond

No. 33 for $500; payable at the National Park Bank, in the City and State of New York.

A. E. GREGORY,
Clerk of the County Court of Jasper County, Mo.
MISSOURI.

## IV.

That said bonds were in fact signed by the presiding justice and clerk of the county court of Jasper county, and attested with its corporate seal, on or about the day of October, 1872, and were not registered by the auditor of the State of Missouri.

## V.

That on the 28th day of March, 1872, John Purcell was the presiding justice of said county court and R. S. Merwin was one of the associate justices; but in October, 1872, prior to the execution of said bonds, said Merwin had become the presiding justice of said court.

## VI.

That the line of railroad of the Memphis, Carthage & Northwestern Railroad Company from Pierce City, in Lawrence county, Missouri, through the county of Jasper and said Marion township into the State of Kansas, extending to the town of Oswego, had been constructed prior to the bringing of this suit, and is now in constant operation.

## VII.

That the bonds in controversy, of form aforesaid, were sealed with the seal of the county court of Jasper county, affixed by the clerk, and signed by the clerk and by R. S. Merwin, presiding justice of said court, and were delivered in October, 1872, to the Union Savings Association of St. Louis, for the use of one Edward Burgess, a contractor for the building of the railroad named in the bonds, having first removed the first two coupons, and from said Burgess said bonds were purchased by one William C. Wilson, at the rate of fifty-five cents on the dollar, which was then the market value of said bonds, and the same were paid for in November, 1872, by the said Wilson giving his check to Burgess for the amount ($27,500) which was paid.

## VIII.

That the county court of Jasper county levied and caused to be collected taxes on the taxable property of Marion township, in the years 1872, 1873 and 1874, to pay the interest on its railroad indebtedness, including the bonds here in controversy; that said county court appointed an agent in New York City to pay the interest on said bonds, and directed its treasurer to forward the funds therefor, and subsequently revoked the authority of said agent as to the bonds here in controversy; and that said county court ordered R. S. Merwin, its presiding justice, to deliver the coupons detached from the bonds here in controversy to the treasurer, with directions for them to be held until further orders.

## IX.

That the county of Jasper, for Marion township, had issued a set of $50,000 bonds, bearing eight per cent interest per annum, dated November 1st, 1871, prior to those here in controversy. That the clerk of the county court of Jasper county wrote and addressed the following letter:

OFFICE OF THE COUNTY CLERK JASPER COUNTY,
Carthage, Mo., November 3d, 1872.

T. S. RUTHERFORD,
President Union Savings Association, St. Louis, Mo.—

DEAR SIR: Your letter of October 31st is just received. If the interest due on the Marion township bonds could be put off about one month longer all would be right; we have levied $16,000 to meet the interest on those bonds and the second issue, which is now being collected, and of course you understand the law governing the collection of taxes. I will, however, present your letter to the court this week, and endeavor to have some arrangement made for sending the money to New York.

Very truly yours,
Rec'd Nov. 5th. A. E. GREGORY, Clerk.

That William C. Wilson was shown said letter prior to his said purchase of said bonds.

X.

That the plaintiff is a *bona fide* holder for value paid before maturity, at their market value, of the bonds and coupons here in controversy, without any knowledge of the alleged defects or infirmities other than such as is implied by law.

And upon the above statement of facts the court declares the law to be with the defendant, and orders final judgment for the defendant herein, to which ruling of law the plaintiff now excepts.

Done this 11th day of September, 1880.

A. KREKEL, Judge.

(Pages 16 to 21, Printed Record.)

On the facts thus found the court below gave final judgment against plaintiff and in favor of defendant, and plaintiff has brought the case, by writ of error, to this court for review on the sufficiency of the finding of facts to support the judgment of the court below holding the bonds and coupons detached therefrom to be void.

The plaintiff in error affirms that the bonds and coupons in controversy, on the facts disclosed in the special finding, are valid and binding obligations of the defendant, and that the judgment should have been for plaintiff for the amount of the coupons sued on.

The law of the State of Missouri under which said bonds, as shown by their recitals, were so voted and subscribed, and which was in force at the time of the submission of the proposition to make said subscription, to the voters of said township; which was in force at the time the vote approving the proposition was taken; which was in force at the time the subscription to the stock of said company was made by the county court for said township pursuant to the vote so given; and which was in force at the time said subscription became binding by the acceptance thereof by said company, is contained in section one of "An act to facilitate the construction of railroads in the State of Missouri," approved March 23d, 1868, which may be found at page 92 of the Session Laws for that year, and which act is recited in the bonds in dispute. Said section one of said act is as follows:

"SECTION 1. Whenever twenty-five persons, tax-payers and residents in any municipal township for election purposes, in any county in this State, shall petition the county court of such county, setting forth their desire, as a township, to subscribe to the capital stock of any railroad company in this State building or proposing to build a railroad into, through or near such township, and stating the amount of such subscription and the terms and conditions on which they desire such subscription shall be made, it shall be the duty of the county court, as soon as may be thereafter, to order an election to be held in such township, to determine if such subscription shall be made; which election shall be conducted and returns made in accordance with the law controlling general and special elections; and if it shall appear from the returns of such election that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription, it shall be the duty of the county court to make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the county court shall issue such bonds in the name of the county, with coupons for interest attached; but the rate of interest shall not exceed ten per cent per annum; and the same shall be delivered to the railroad company."

This statute having been in force, as before stated, when the bonds in controversy were voted by the township, and when they were subscribed by the county court to the company, and when the subscription was accepted by the company and thereby became the binding contract of the parties, plaintiff affirms that that law must be taken as entering into and forming a part of the contract subscribing said bonds so made and accepted, and that the validity of the bonds in controversy must be determined by the provisions of said statute in force when the contract subscribing said bonds was so made and accepted, and which statute is recited in the bonds as the source of the authority for their issue.

Defendant affirms that said bonds are void because of the failure to comply, in the execution and delivery of the bonds, with the provisions of an act of the legislature of Missouri passed and approved after said bonds were so voted, and after they were so subscribed and the subscription was so accepted by the company, and consequently after said subscription became the binding contract of the parties.

This law, thus passed after the contract subscribing the bonds in suit was made and accepted, and which is relied upon by defendant as invalidating the bonds issued under that previously-accepted contract of subscription, is entitled "An act to provide for the registration of bonds issued by counties, cities and incorporated towns, and to limit the issue thereof." Said act reads as follows:

"SECTION 1. No county, city or incorporated town shall hereafter issue any bonds exceeding ten per cent of the assessed value of such county, city or incorporated town, nor shall any county, city or incorporated town have the right or power to issue any bonds whatever so long as the whole bonded indebtedness of such county, city or town equal or exceed ten per cent of its respective assessed value, according to the state and county assessment of the last preceding year: *Provided*, That nothing in this section shall apply to bonds issued, or hereafter to be issued, by cities, towns and villages for the sole use of erecting school-houses or public buildings for educational purposes.

SEC. 2. All such bonds and interest coupons shall be made payable at some place certain, and whenever the county court, city council or board of trustees shall fail to designate the place of payment, then the same shall be paid at the state treasury.

SEC. 3. It shall be the duty of the chief financial officers (clerk, auditor or comptroller) of any county, city or incorporated town to furnish the state auditor a statement, verified by his oath, of all the bonds and coupons outstanding, with all the details the auditor may desire as to date of issue and maturity, rate of interest, place of redemption, purposes for which issued, and the like; and the said officer shall annually thereafter, on or about the first day of January, make a statement of the bonds and coupons retired by his county, city or incorporated town since the last report. The state auditor shall make entry of the bonds so reported.

SEC. 4. Before any bond, hereafter issued by any county, city or incorporated town for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the state auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify by endorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceedings to test or determine the validity or such bonds, or the power of any county court, city or town council, or board of trustees or other authority to issue such bonds; and the remedy of injunction shall also lie at the instance of any taxpayer of the respective county, city or incorporated town to prevent the registration of any bonds alleged to be illegally issued, or founded under any of the provisions of this act.

SEC. 5. The state auditor shall receive a compensation of twenty-five cents for the registration of each bond hereafter issued, to be paid by his warrant drawn upon the treasury of the respective county, city or town.

SEC. 6. The state auditor shall annually, on or before the first day of July, certifiy to the several county courts, city councils or trustees of an incorporated town the amount required during the next fiscal year for the payment of maturing interest coupons, together with the ordinary costs to the State of collection and disbursement of the same, which amount shall thereupon be levied as a special tax upon all property in such county, city or town, and shall be collected with the state revenue and paid over to the state treasurer to the credit of the several counties, cities or towns: *Provided*, That this special tax may be paid in coupons registered under this act over-due or maturing during the current fiscal year.

Sec. 7. The state treasurer shall provide for the payment of maturing coupons so registered out of such funds, and no other, as may be in the treasury to the credit of the respective counties, cities and incorporated towns whose bonds have been registered under this act, in the same manner as he does for those issued by the State, and allow, at the expense of the maker, not more than the same compensation for redemption to the bank or banks at which they are made payable than he does for the redemption of state coupons.

Sec. 8. It shall be the duty of the state treasurer to apply the amount remaining to any county, city or town after deducting the sum required for redemption of registered coupons maturing during the then current fiscal year, and six months thereafter, to the redemption of not matured bonds of such county, city or town, under the direction of the respective county court, city council or trustees of any town. He shall certify at least once in every fiscal year to the state auditor the several amounts and numbers of bonds and coupons by him or through him redeemed, and shall return such bonds and coupons, properly cancelled to prevent their re-issue, to the makers thereof.

Sec. 9. Nothing herein contained shall prevent any county court, city council or trustees of any incorporated town in this State to levy a larger tax for the payment of maturing bonds, or to apply other means to such purpose; but all taxes levied for the payment of registered bonds or coupons, and all sums of money which are appropriated for the same purpose, shall be paid into the state treasury, and all registered bonds and coupons shall be redeemed and cancelled by or under the direction of the state treasurer.

SEC. 10. The State shall be deemed the custodian only of the several taxes so collected and credited to such county, city or town and shall not be deemed in any manner liable on account of any such bonds and coupons; but the tax and the funds so collected shall be deemed, pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied.

SEC. 11. Any county, city or town that desires to place its outstanding indebtedness under the provisions of this act, may do so by funding the same and issuing new bonds in lieu of the present ones, upon such terms and bearing such interest, with such length of time to run, as may be agreed upon between the county, city or town and the holder of its bonds; *Provided, however*, that the contract for funding, with the terms of the same, shall be assented to by a majority of the qualified voters of such county, city or town, at a general or special election held therefor, and at least thirty days public notice of the same shall be published in every paper in the county, city or town; and when there are none, then by four printed hand-bills, put up in the most public places in every voting precinct in such county, city or town.

SEC. 12. When any county, city or town shall order its outstanding indebtedness to be funded, as provided for in section eleven, a certified copy of the order of election, with the record of election, shall be sent to the auditor, and he shall endorse the bonds issued under the same as funding bonds under this act.

SEC. 13. Nothing in the provisions of this act shall be construed as to include any bonds that have been or may be issued by any municipal corporation for gas works or water works.

SEC. 14. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC. 15. This act shall take effect and be in force from and after its passage.

Approved, March 30th, 1872."

# ASSIGNMENT OF ERRORS.

---

And now comes said plaintiff in error and assigns the following errors of the court below in the decision of this cause, viz:

## I.

Said court erred in adjudging that said last-recited act of March 30th, 1872, was intended by its framers to apply to past transactions and to bonds voted and to subscriptions of bonds made and accepted before its passage, and in applying said act to the bonds in controversy which were so voted and subscribed to and accepted by said company prior to the passage of said act.

## II.

Said court erred in not adjudging that said act of March 30th, 1872, if intended by its framers to be applicable to the bonds in controversy, was void as being in conflict with that provision of the Missouri State Constitution which forbids the passage of any law "retrospective in its operation."

## III.

Said court erred in not adjudging that section four of said act of March 30th, 1872, vesting judicial power in the auditor of state, who is a member of the executive and not the judicial department of the state government, to hear and determine, upon evidence and a consideration of the law, whether the law governing the issue of bonds sought to be registered with him and the terms on which they have been subscribed have been complied with, is void under the state constitution, which separates the state government into three departments, viz: executive, judicial, and legislative.

## IV.

Said court erred in not adjudging that said act of March 30th, 1872, is unconstitutional and void, as applicable to the bonds in controversy so voted and subscribed before its passage, both under the constitution of the United States and the constitution of Missouri, which forbid the passage of laws impairing the obligation of contracts.

## V.

The court erred in adjudging the bonds and coupons in controversy to be void.

## VI.

The court erred in giving judgment for the defendant, and in not giving judgment for the plaintiff for the amount sued for.

Wherefore, plaintiff in error prays that the judgment of the court below be reversed and the cause remanded, with directions to the court below to give judgment for the plaintiff in error.

JAMES S. BOTSFORD,
MARCUS T. C. WILLIAMS,
For the Plaintiff in Error.

# ARGUMENT.

## POINTS OF FACT.

The findings of the trial court conclusively establish the following propositions of fact:

### I.

That in the latter part of 1871 a subscription and issue of bonds for $50,000 was made by defendant county for said Marion township to said railroad company, which bonds were dated November 1st, 1871, and bore interest at eight per cent per annum. The fact of the subscription and issue of these bonds appears from the ninth paragraph of the findings, where it is stated "that the county of Jasper, for Marion township, had issued a set of $50,000 bonds bearing eight per cent interest per annum, dated November 1st, 1871, prior to those here in controversy;" and also from a clause in the second paragraph of said findings, where, in speaking of the subscription of the bonds in controversy, it is stated that said railroad company "accepted said subscription of stock then and there, by its terms payable in the bonds of said township, and by virtue of said subscription and a prior subscription caused said township to be and appear upon its stock transfer book as the holder and owner of 1,000 shares of stock, amounting in the aggregate to $100,000." (*Ante*, pp. 5, 8.)

## II.

That on February 10th, 1872, the order of submission of the proposition of subscription of the bonds in controversy was made by the county court of defendant county to the voters of said township, and that at an election held on March 5th, 1872, in said township, said proposition was ratified by the voters thereof. These facts appear from the order of the court of March 28th, 1872, contained in the first paragraph of the findings, which recites as follows: "Whereas, it appearing from the returns of an election held in pursuance of an order of this court on Tuesday, the 5th day of March, A. D. 1872, that more than two-thirds of the qualified voters of the municipal township of Marion, in Jasper county, Missouri, voting at said election are in favor of subscribing to the capital stock of the Memphis, Carthage & Northwestern Railroad Company seventy-five thousand dollars, upon the terms and conditions as set forth in the petition heretofore presented and the order of this court made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made." (*Ante*, p. 2.)

## III.

That pursuant to said election the county court of said county, on March 28th, 1872, made a subscription on behalf of said township to the stock of said railroad company for the sum of seventy-five thousand dollars, payable in bonds to be signed by the presiding justice of said court and attested by its clerk, with its seal affixed; and that on the same day, —viz: March 28th, 1872,—said subscription of said bonds was accepted by said company. These facts appear from the order of subscription of the bonds by the county court made said March 28th, 1872, in the following words: "Wherefore, it is ordered by the court that the sum of seventy-five thousand dollars be and is hereby subscribed to the capital stock of said railroad company in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court and attested by the clerk of this court, with the seal of this court affixed." The fact of the subscription of the bonds to and its acceptance by the said railroad company on the 28th day of March, 1872, and before the passage of the registration act of March 30th, 1872, also appears from the second paragraph of the findings of the court below, which finding is in the following language: "March 28th, 1872, the county court of Jasper county, pursuant to the general statute of the State of Missouri entitled 'An act to facilitate the construction of railroads in the State of Missouri,' approved March 23d, 1868, and pursuant to the vote of two-thirds of the qualified voters of said Marion township assenting thereto at a special election, subscribed to $75,000 of the capital stock of the Memphis, Carthage & Northwestern Railroad Company, a corporation organized and existing under and in pursuance of the general statutes of the State of Missouri, and said corporation accepted said subscription of stock then and there, by its terms payable in the bonds of said township, and by virtue of said subscription and a prior subscription caused said township to be and appear upon its stock transfer book as the holder and owner of 1,000 shares of stock, amounting in the aggregate to $100,000, which it still continues to hold." (*Ante*, pp. 3, 5.)

## IV.

The bonds in controversy, signed by the presiding justice and clerk of the Jasper county court with its seal affixed, were issued and delivered, payable to said railroad company or bearer, in conformity with the mode of execution prescribed by the order of subscription of March 28th, 1872, viz: "that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court and attested by the clerk of this court, with the seal of this court affixed;" and they were issued in compliance with section one, hereinbefore cited from the act of March 23d, 1868, which was the law in force when the bonds were voted by the township and subscribed by the county court and accepted by the railroad company, and each of the bonds contained a recital in the following language: "This bond is issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the State of Missouri entitled, 'an act to facilitate the construction of railroads in the State of Missouri,' and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township." (*Ante*, pp. 3, 6.)

V.

That plaintiff is a *bona fide* holder for value paid before maturity, at their market value, of the bonds and coupons here in controversy. This was expressly found by the court below in paragraph ten of its findings. (*Aute*, pp. 7, 9.)

VI.

That the county court of said county levied and caused to be collected taxes on the property of said township, in the years 1872, 1873 and 1874, to pay said interest coupons in controversy, detached from said bonds, and appointed an agent in New York to pay said interest on said bonds, and directed the county treasurer to foward the funds therefor to said agent. This was expressly found in paragraph eight of the findings. The tax levy to pay these coupons which was made in 1872 was ordered by the court June 6th, 1872, which was but a trifle more than sixty days after the subscription of the bonds to, and its acceptance by the company March 28th, 1872. This fact is shown by the order of the county court of June 6th, 1872, set out in the first paragraph of the findings, and the letter of the county clerk dated November 3d, 1872, contained in the ninth paragraph of the findings. (*Ante*, pp. 3, 8.)

VII.

That the railroad to aid in the building of which said subscriptions were both made by said township to said company, had been constructed and was in constant operation before the bringing of this suit. This is shown by the sixth paragraph of the findings by which the court below found the fact as follows: "That the line of railroad of the Memphis, Carthage & Northwestern railroad company, from Pierce City in Lawrence county, Missouri, through the county of Jasper and said Marion township into the State of Kansas, extending to the town of Oswego, had been constructed prior to the bringing of this suit, and is now in constant operation." By the aid of a map of Missouri and Kansas it will be seen from this finding of the court below that the flourishing city of Carthage, which is situate in said Marion township and is the county seat of said county, obtained by the completion of this road three important connections, viz: at Pierce City, Missouri, the Atlantic & Pacific railroad, now the St. Louis and & San Francisco railroad, extending east and completing the line from Carthage to St. Louis; at Oswego, Kansas, with the Missouri, Kansas & Texas railroad, now a part of the Missouri Pacific railroad, extending south and completing the line from Carthage to Texas; and at Columbus, Kansas, with the Missouri River, Fort Scott & Gulf railroad, now known as the Kansas City, Fort Scott & Gulf railroad, extending north and completing the line from Carthage to Kansas City. (*Ante*, p. 7.)

## POINTS OF LAW.

On these facts plaintiff in error affirms the following propositions of law as decisive of this controversy in favor of the validity of the bonds and the coupons sued on, and the reversal of the judgment of the court below.

### I.

The said registration act of March 30th, 1872, is wholly prospective, and therefore should not be so construed as to apply to the bonds and coupons in this case which were voted by the township, and subscribed by the county court, and the subscription accepted by the railroad company, before the passage of said act.

### II.

The said registration act of March 30th, 1872, if intended to apply to the bonds in controversy, previously voted and subscribed to and accepted by the railroad company, is void under the operation of that provision of the Missouri state constitution which forbids the passage of any law "retrospective in its operation."

### III.

The fourth section of said registration act of March 30th, 1872, is void on its face, for the reason that the power thereby vested in the state auditor to hear and determine on evidence and a consideration of the law whether bonds presented for registration have been issued according to law, and whether the conditions of the subscription have been complied with, being judicial power reposed in an executive officer, the said provision which confers the power violates that provision of the Missouri state constitution which vests the executive, judicial and legislative powers of the state government in three separate and distinct departments of government.

## IV.

The said registration act of March 30th, 1872, if construed so as to apply to the bonds in controversy voted by the township, and subscribed by the county court, and accepted by the railroad company, prior to its passage, impairs the obligation of the contract of subscription so made and accepted, and in payment of which subscription said bonds were executed and delivered, and is therefore, as applied to these bonds, void under the operation of that provision of the constitution of the United States, and the constitution of the State of Missouri, forbidding the passage of any law impairing the obligation of contracts.

## V.

The railroad, to aid in the building of which said bonds were subscribed and the proceeds thereof used, having been completed and being in constant operation, to the great advantage of the people of the city of Carthage and of Marion township; the county court of the county having levied taxes to pay these coupons during the three years of 1872, 1873 and 1874, during which period and on the faith of which tax levies said bonds were placed on the market and sold; the plaintiff in error being an innocent purchaser of the bonds and coupons sued on in good faith and for value; and the bonds having been executed and delivered, as the record expressly shows, in entire good faith, and in compliance with all the provisions of the act of March 23d, 1868, in force when they were voted and subscribed, and recited in the bonds, their validity should now be upheld and judgment given for the amount of the coupons sued on.

---

We will consider the foregoing points of law in the order in which they are presented:

I.

The said registration act of March 30th, 1872, is wholly prospective in its language, and therefore should not be so construed as to apply to the bonds and coupons in this case, which were voted by the township, and subscribed by the county court, and the subscription accepted by the railroad company, before the passage of said act. It is a well-settled rule that statutes should be construed to operate prospectively unless a retrospective effect be clearly intended.

*Muray v. Gibson*, 15 How., 421.
*McEwen v. Den*, 24 How., 242.
*Harvey v. Tyler*, 2 Wall., 328.
Cooley's Con. Lim., p. 370.
Sedgwick on Stat. & Con. Law, p. 190.

In the case of *Murray v. Gibson, supra,* this court used the following language:

> "As a general rule for the interpretation of statutes it may be laid down that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate on the future only. Especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of those rights."

And accordingly in that case it was adjudged that "the statute of Mississippi limiting suits on judgments recovered out of that state did not apply to judgments recovered before its passage."

And in the case of *McEwen v. Den, supra,* where this court adjudged that a statute of Tennessee, providing that proof of deeds taken before the clerk of a court of another state should be valid and might be registered, is prospective only in its operation and does not cover acknowledgements previously made, the following language was used by this court:

> "We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit: That it is of the very essence of a new law that it shall apply to future cases, and such must be its construction unless the contrary clearly appears."

The registration act of March 30th, 1872, (*Ante,* p. 12,) is neither a revising or amendatory act, and does not profess to be other than a new law designed to furnish rules of action for future transactions. In the Missouri constitution it is provided (Const. 1865, art. 4, sec. 32,) that "no law enacted by the general assembly shall relate to more than one subject and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title such act shall be void only as to so much thereof as is not so expressed." In view of this constitutional provision the title of a legislative act becomes a very important part of it, and should be looked to in connection with the language of the statute to determine its purpose and meaning.

The title of the registration act of March 30th, 1872, is as follows: "An act to provide for the registration of bonds issued by counties, cities and incorporated towns, *and to limit the issue thereof*." This language is wholly prospective and only applies to bonds thereafter to be issued. It may be said, however, that this principle is not violated by applying the act to bonds voted or subscribed before, but executed and delivered after its passage, and the opening clause of the first section, that "no county, city or incorporated town shall hereafter issue any bonds," may be resorted to in support of this view. But when the whole of this first section of the registration act is applied to the case of township bonds like the one at bar, it will be found that the term "shall hereafter issue any bonds" comprehends much more than the mere execution and delivery of the bonds. The first section of the registration act provides that "no county, city or incorporated town shall hereafter issue any bonds exceeding ten per cent of the assessed value of such county, city or incorporated town, nor shall any county, city or incorporated town have the right or power to issue any bonds whatever so long as the whole bonded indebtedness of such county, city or town equal or exceed ten per cent of its respective assessed value."

As this act has been held to apply to township bonds, the question arises: Upon the exercise of whose power does this prohibition operate as a limitation? Is the statute which forbids the issue of township bonds in excess of ten per cent of the assessed value of the property of the township addressed to the presiding justice and clerk of the county court, who execute and deliver the bonds, or to the members of the county court who subscribe the bonds, or to the people of the township who vote the bonds? This question must be answered by determining whose duty it is under the township-aid act to fix the amount of the bonds that shall be subscribed and executed and delivered. If the duty of fixing the amount of the bonds devolves upon the presiding justice and clerk who execute and deliver the bonds, then said section one may be applied to the bonds in this case, for the bonds in controversy were executed and delivered after the passage of that act, although the voting and subscribing of the bonds had taken place before. But if the duty devolves upon the voters of the township who vote the bonds, or upon the county court who subscribe the bonds, then the statute cannot operate in this case, for the reason that the amount of the issue of the bonds in this case had already been fixed, and therefore the prohibition could not operate.

By the first section of the township-aid act, (*Ante*, p. 10,) it is provided that whenever twenty-five tax-payers of a township petition the county court, setting forth the desire of the township to aid the building of a railroad being built or proposed to run through the township, "*and stating the amount of such subscription and the terms and conditions on which they desire such subscription shall be made*," the county court shall order an election to determine if such subscription shall be made, and the election having been held and canvassed by the county court, that tribunal, if the vote is favorable, shall make the subscription and issue the bonds. This section contemplates that the terms of the subscription, including the fixing of its amount, shall be stated in the petition for the election to the county court by the twenty-five tax-payers of the township, and the proposition thus presented to the county court, including the terms and amount of the subscription, must be submitted to and approved by the voters of the township, who, by their approval, fix the terms and amount of the subscription to be made by the county court for the township. The township-aid act contemplates six distinct acts to be performed to constitute the issue of township bonds:

*First.* The presenting of the petition to the county court by the twenty-five tax-payers of the township, "stating the amount of such subscription" and praying for an election to be held.

*Second.* The ordering of the election by the county court on the petition presented.

*Third.* The election by the qualified voters of the township to determine whether the county court shall make the subscription proposed.

*Fourth.* The canvassing of the vote by the county court and declaration of the result.

*Fifth.* If the result is favorable, the making of the subscription by the county court to the stock of the railroad company.

*Sixth.* The execution and delivery of the bonds in payment of the subscription.

In this case the first five of these acts had taken place before the passage of the registration act.

The petition had been presented to the county court by the tax-payers of the township; the county court had ordered the election to be held; the election had been held; the returns of the election had been canvassed and the result found favorable and so declared; and the county court had made the subscription of the amount fixed in the original petition of the tax-payers and approved by the voters; and the subscription had been accepted by the company to which it was made, the subscription providing that it should be paid by the bonds of the county for the township, to be signed by the presiding justice and clerk of the court, with the seal affixed.

After all these things had been done and had become accomplished facts, and nothing remained but for the presiding justice and clerk to sign and deliver the bonds in payment of the subscription; after the order of election had been made, the election held fixing the amount of the subscription and the making of the subscription; and after the entire transaction, with the single exception named, had become complete and binding on the parties, then is passed this act of registration entitled "An act to provide for the registration of bonds issued by counties, cities and incorporated towns, and to limit the issue thereof." If the act had been intended to apply to a completed transaction like this one, where the rights of the parties had become fixed, the opening clause of the first section should have commenced as follows: "No officer or officers of any county, city or incorporated town shall hereafter sign and deliver any bonds exceeding ten per cent of the assessed value of such county, city or incorporated town." And the fourth section should have commenced as follows: "Before any bond hereafter signed and delivered by any officer or officers of any county, city or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the state auditor." But no such language as this is used in either section one or four.

But the language of section one of the act is: "No county, city or incorporated town shall hereafter issue any bonds exceeding ten per cent of the assessed value of such county, city or incorporated town."

The prohibition of the act is not directed or addressed to the officers who perform the mere simple office of signing and delivering the bonds, but is addressed to the municipality as a whole. In the case of a county subscription the prohibition would reach the voters as well as the county court if a vote should be required; in the case of a city it would reach the mayor and council and also the voters where a vote should be required; in the case of an incorporated town, it would reach the board of trustees and the voters where a like vote should be required. But township bonds in Missouri were never issued except under the township-aid act of March 23d, 1868, and assuming that the registration act applies to township bonds issued under that act, it follows that the prohibition of the registration act in order to have effect in this case must have been addressed to the twenty-five tax-payers of Marion township who had already petitioned the Jasper county court for an election; to the county court who had already ordered the election; to the voters who had already voted for the bonds; and to the members of the county court who had already made the subscription before the act containing the prohibition had been passed. The county court in acting under the township-aid act has no discretion, but must make the subscription and issue the bonds in the amount and as directed by the voters of the township.

The term "no county, city or incorporated town shall hereafter issue any bonds exceeding ten per cent of the assessed value," as applied to township bonds, embraces the presenting of the petition to the county court, the ordering of the election, the election by the voters and the subscription by the court to the railroad company. All these things had taken place in this case before the registration act was passed, and to apply to them the prohibitions of the act would be to construe the act to be retrospective in its operation in opposition to the well established rule of construction which we have invoked. And as the expression in the first section, "no county, city or incorporated town shall hereafter issue any bonds," and the expression in the fourth section, "before any bond hereafter issued by any county, city or incorporated town for any purpose whatever shall obtain validity," should, as applied to township bonds, be construed the same, being like forms of expression, we submit that the act should not be construed to operate retrospectively, and therefore not to have been intended by the legislature to apply to this case, viz: to bonds voted and subscribed before its passage.

## II.

But if said registration act of March 30th, 1872, was intended by its makers, and must be construed, to apply to the bonds in controversy, then said act is void under the operation of that provision of the Missouri state constitution which forbids the passage of any law "retrospective in its operation." It may be well at this point to examine the different state constitutions containing provisions forbidding this sort of legislation. In doing so we will refer to the two volumes containing the "Charters and Constitutions" of the several states, compiled under an order of the United States senate by Ben. Berley Poore, clerk of printing records. The provision to be found in nearly all the state constitutions is in the following language:

> "No *ex post facto* law, nor law imparing the obligation of contracts shall ever be made."

This prohibition is also contained in the federal constitution from which the above provision in the state constitutions was probably borrowed. By this prohibition two classes of retrospective laws are forbidden: First, *ex post facto* laws, and second, laws imparing the obligation of contracts. As those prohibitions have repeatedly been construed by this court and have received a definite, settled meaning, we will not pause here to consider them. In a few of the states this well settled form of expression has been departed from. Thus, in the Maryland constitutions of 1776, 1851 and 1864 (Vol. I., pp. 818, 838 and 860) is to be found the following provision:

> "That retrospective laws punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty, wherefore no *ex post facto* law ought to be made."

We have not examined the Maryland decisions, but the foregoing language in her constitution would probably be construed as of like import and meaning as the usual prohibition found in the federal and state constitutions forbidding the passage of *ex post facto* laws. The North Carolina constitutions of 1776 and 1868, (Vol. II, pp. 1410 and 1421) contain the same language as the provisions cited from the Maryland constitutions.

In the New Hampshire constitution (Vol. II., p. 1296) the following language is used:

> "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offences."

The last clause of this provision, prohibiting laws made for the "punishment of offences," is the same in effect as the ordinary provision forbidding the passage of *ex post facto* laws.

The other clause in the New Hampshire constitution forbidding laws made "for the decision of civil causes" goes at least one step beyond the usual provision in our state constitutions forbidding *ex post facto* laws and laws impairing the obligation of contracts. But in no other respect are retrospective laws forbidden by the New Hampshire constitution. We here call attention to a few cases construing the provision cited from the New Hampshire constitution:

In *Society v. Wheeler*, 2 Gallison, 139, Story, J., says:

> "What is a retrospective law within the true intent and meaning of this article? Is it confined to statutes which are enacted to take effect from a time anterior to their passage, or does it embrace all statutes which, though operating only from their passage, affect vested rights and past transactions? It would be a construction utterly subversive of all the objects

of the provision to adhere to the former definition. It would enable the legislature to accomplish that indirectly which it could not do directly. *Upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective, and this doctrine seems fully supported by the authorities.*"

The supreme court of New Hampshire, in *Woart v. Winnick*, 3 N. H., 473, in speaking of retrospective laws, says:

"They have been denounced by the most sound and intelligent jurists and statesmen in every age."

And the same court, in *Clark v. Clark*, 10 N. H., 386, says:

"Thus a law which should provide that promissory notes made payable on demand should be payable at the expiration of a year, and that no suit should be maintained upon them until the expiration of that time, *if applied to existing contracts of that character*, would be a retrospective law for the decision of a civil cause, not only in relation to actions then pending upon such contracts, but also as to all notes of that description then in existence."

See also *Dow v. Norris*, 4 N. H., 16, and *Rich v. Flanders*, 39 N. H., 304.

In the State of Texas (Vol. II, p. 1768), the following constitutional provision is in force:

"No bill of attainder *ex post facto* law, retroactive law or any law impairing the obligation of contracts shall be made."

This provision was fully considered by the Texas supreme court in *De Cardova v. Galveston*, 4 Texas, 470, where it was held that the prohibition in the bill of rights against retroactive laws was designed to embrace laws which are not included in the description of *ex post facto* laws or laws impairing the obligation of contracts.

The constitutional provision on the subject in the State of Missouri, which has been in force ever since the state was admitted into the Union, (Const. of 1820, Art. 13, Sec. 17, Vol. II, p. 1115, Const. of 1865, Art. 1, Sec. 28, Vol. II., p. 1138, and Const. of 1875, Art,. 2, Sec. 15. Vol. II, p. 1166,) and by which the validity of the registration act of March 30th, 1872, must be determined, is in the following language:

> "That no *ex post facto* law, *nor law* impairing the obligation of contracts, *or retrospective in its operation*, can be passed."

What is the meaning of this prohibition against the passage of any law "retrospective in its operation?" In the case of *City of St. Louis v. Clemens*, 52 Mo., 133, it was adjudged that where certain sewers in that city had been constructed under an ordinance which left the dimensions of the sewer to the city engineer, contrary to the provisions of the city charter which provided that the dimensions should be determined by ordinance of the city council, no liability was created on the part of the property owners to pay for the work done, and that an act of the legislature subsequently passed authorizing the city to re-assess the sum remaining unpaid on the real estate benefitted by the improvement was retrospective and void under the provision of the state constitution forbidding the passage of a law "retrospective in its operation."

The court, in that case, used the following language:

"But to return to the real question in this case: Is the act of the 21st of March, 1870, under which the tax bill sued for in this case was and is assessed, a retrospective law coming within the prohibition contained in the constitution of this State? It is said by Mr. Sedgwick, after a thorough investigation of retrospective legislation, that 'the result of this branch of our inquiry is, then, that the legislature is competent to give a statute a retroactive or retrospective effect unless—first, the act violates the provision of the federal constitution in regard to *ex post facto* laws, and the obligation of contracts; second, unless it so interfere with the vested rights of property as not to come within the proper limits of the law-making power; *or third, unless it comes within the purview of some express prohibition contained in a state constitution.* (Sedgwick on Statutory and Constitutional Law, page 202.) The 28th section of the first article of the constitution of this State is as follows: 'That no *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation can be passed.' *Here is a positive prohibition against the passage of any law which is retrospective in its operation. There is nothing left for construction; we have only to ascertain what is defined to be a retrospective law, and if the law under consideration comes within the definition, the constitution pronounces the judgment.* Sedgwick defines a retrospective law thus: 'A statute which takes away or impairs any vested right acquired under existing laws or creates a new obligation, *or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, is to be deemed retrospective or retroactive.'* (Sedgwick Statutory Constitutional Laws, 188.)

Retrospective laws, even where they were not prohibited by a constitutional provision, were never favored, and it was this disfavor which induced the convention that framed the constitution of this state to prohibit such legislation. In the case of *Hope Mutual Ins. Co. v. Flynn*, (38 Mo., R. 493,) Judge Wagner, who deliverd the opinion of the court, adopts and approves of the definition given by Sedgwick of a retrospective law, and says: 'No new ground of support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defence, etc.' (See also *Fowler v. The City of St. Joseph*, 37 Mo., 228.)"

The case of *St. Louis v. Clemens*, containing the foregoing language, is the only well-considered case we have been able to find in the Missouri Supreme Court Reports.

In *ex parte Bethnum*, 66 Mo. Rep., p. 551, the Missouri supreme court use the following language:

"The constitution of 1865, sec. 28, of the bill of rights declared that 'no *ex post facto* law nor law impairing the obligation of contracts, or retrospective in its operation can be passed;' yet in all the heated discussions which grew out of the provisions of that instrument imposing test oaths, it was never urged that those provisions were in conflict with that section. It is true that the test oaths were required, not by an act of the legislature, but by the constitution itself; yet surely the framers of that instrument did not use the phrase 'law retrospective in its operation' in its literal sense, and as applicable alike to crimes and criminal procedure and civil obligations and proceedings in civil cases, otherwise they would be chargeable with having done the very thing which they had forbidden in section 28. *It was evidently supposed by the authors of the provisions, which were complained of as proscriptive and unconstitutional, that not having declared the acts crimes*, which they required ministers and others to swear that they had not committed, they had evaded the *ex post facto* provision of the constitution of the United States. There was room for discussion on that question, but if the clause 'law retrospective in its operstion' applied equally to crimes and contracts, it was most flagrantly in conflict with the 28th section. We conclude, therefore, that in the constitution of 1865, that phrase was used as we have interpreted its meaning in the present constitution. It is scarcely to be presumed that the framers of that constitution, by that clause, meant that no retrospective law, in the broad and literal sense of that phrase, should be passed, and in the same instrument proceeded to impose disabilities for acts previously committed, and provided for ascertaining who of the proscribed classes had committed them, by the oath of all who desired to pursue the avocations of lawyer, minister of the gospel or teacher."

The true value of this adjudication can be determined when it is considered that no mention is made of the leading case of *St. Louis v. Clemens*, 52 Mo., 133, to which we have referred, and that the entire extract which we have cited from the opinion of the court proceeds upon the assumption that the framers of the Missouri constitution of 1865 were the authors of the prohibition against the passage of any law "retrospective in its operation," when the fact is that the provision containing that prohibition was first adopted in the Missouri constitution of 1820. (Missouri Constitution of 1820, Art. 13, Sec. 17, Vol. II., p. 1115.) And upon this erroneous assumption that the framers of the constitution of 1865 were the original authors of this prohibition, and the fact that that instrument contains provisions exacting from certain classes the taking of test oaths, is built the argument which we have extracted respecting the meaning of the clause forbidding the passage of any law "retrospective in its operation" which was adopted forty-five years before the constitution of 1865, by the first settlers of the State in the constitution of 1820. The decision is, however, not a precedent for this case, for, while there are many loose and erroneous remarks in the opinion such as those which we have cited, the point which arose on the record in that case, and which the court rightly decided, was that the constitutional prohibition against the enactment of laws retrospective in their operation relates to such as concern civil rights and remedies, and not such as concern crimes and punishments or criminal procedure. The point which that case adjudges is the same in principle as the decision of the Texas supreme court in *De Cardova v. Galveston, supra*, where, as we have seen, it was held that the prohibition against retroactive laws was designed to embrace laws which are not included in the description of *ex post facto* laws or laws impairing the obligation of contracts. The prohibition in the Missouri constitution is against three classes of laws, viz: *Ex post facto* laws; laws impairing the obligation of contracts; and any law "retrospective in its operation." And when the early statesmen of Missouri—composed of the Bentons, Bates, Blairs, and other great men of that day—inserted in her first constitution the usual provision forbidding *ex post facto* laws and laws impairing the obligation of contracts, and then added thereto the further prohibition, not in any other state constitution, forbidding *all* laws retrospective in their operation, we must suppose that something was meant by the use of this then new phrase. And the prohibition being against *all* laws retrospective in their operation, effect ought to be given thereto according to the plain meaning of those words.

The language of the Texas constitution is prohibitory of retroactive laws, by which may have been meant laws which disturb vested rights. But the prohibition of the Missouri constitution goes further, and forbids the passage of any law which is "retrospective in its operation." A law may not be intended to be retrospective; it may not be retrospective on its face; but if it *operates* retrospectively, then to that extent it is void, although not intended to so operate, and not susceptible of that construction by reference to its express terms. But if it *operate* retrospectively then it is void. The word retrospective is very comprehensive. Webster defines the word retrospective as follows: "Having reference to what is past; affecting things past."

Retrospective laws are of four kinds, *ex post facto* laws, laws impairing the obligation of contracts, laws divesting or injuriously affecting vested rights not created by contracts but conferred by the law of the land; and all other laws not within either of these classes, but which are retrospective in their operation. But laws which are *ex post facto* or which impair the obligation of contracts are specially forbidden, and are, therefore, as the cases cited have properly held, not comprehended within the prohibition against retrospective laws. And the same is true of laws divesting or injuriously affecting vested legal rights, for even in the absence of a constitutional prohibition against the passage of such laws, no American court could probably be found at this day holding such laws to be comprehended within the ordinary grant of legislative power. This is evidently the view of Mr. Sedgwick who, on page 202 of his work, uses the following language, quoted with approval in the case of *St. Louis v. Clemens, supra:*

> "The result of this branch of our inquiry is, then, that the legislature is competent to give a statute a retroactive or retrospective effect unless, first, the act violate the provision of the federal constitution in regard to *ex post facto* laws and the obligation of contracts, *or second, unless it so interfere with vested rights of property as not to come within the proper limits of the law-making power*, or third, unless it comes within the purview of some express prohibition contained in a state constitution."

As, therefore, the phrase "law retrospective in its operation" must be held not to embrace laws which are *ex post facto* or impair the obligations of contracts, or divest or injuriously affect vested legal rights, and as it is a familiar rule of construction that effect must be given to *all* the words of a statute, it follows that the prohibition against retrospective laws must be held to comprehend all those laws which are retrospective in their operation which do not disturb vested legal rights or impair the obligation of contracts, or relate to criminal offences. Any other construction than this would render the prohibition meaningless and of no effect. This conclusion is supported by the views of Mr. Justice Story in *Society v. Wheeler, supra,* in passing upon a law under the restricted language of the constitution of New Hampshire forbidding retrospective laws "for the decision of civil causes," where he used the following language, which has since been adopted by Mr. Sedgwick:

> "Upon principle every statute which takes away or impairs vested rights acquired under existing laws, *or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,* must be deemed retrospective, and this doctrine seems fully supported by the authorities."

Let us now apply these tests to the statute under consideration. Before the passage of the registration act of March 30th, 1872, the petition of twenty-five tax-payers of Marion township for an election had been presented to the Jasper county court, the election had been ordered, the election had been held and resulted in the people voting the bonds, the subscription of the bonds had been made pursuant to and in accordance with the law in force, and the order of subscription made by the county court and accepted by the company provided that the bonds should, when issued, be signed by the presiding justice and clerk of the county court, with the seal affixed. Can the first and fourth sections of the registration act be applied to these past transactions without being retrospective in their operation? Does not the provision of section four that the bonds, although signed by the presiding justice and clerk according to the subscription made and accepted prior to the act, must be registered with the state auditor create, in the language of Mr. Justice Story, "a new obligation and a new duty in respect to transactions or considerations already past?" And does not the provision of said section four that the bonds shall not have validity or be negotiated, as applied to this case, attach "a new disability in respect to transactions or considerations already past?" We think, apart from the other objections to said act of registration on the grounds we now proceed to make, that it is void as applied to this case as being a law "retrospective in its operation."

## III.

The fourth section of the said act of March 30th, 1872, for the registration of bonds, is in contravention of article three of the constitution of the State of Missouri, concerning the distribution of the powers of government to the three district departments, viz: legislative, executive and judicial, and prohibiting the exercise of powers properly belonging to one of these departments by any person charged with the exercise of powers properly belonging to either of the others, inasmuch as it delegates the exercise of judicial power to the state auditor, a member and a part of the executive department of the State, to hear and determine, upon evidence and a consideration of the law, whether the law governing the issue of bonds sought to be registered with him, and the terms on which they have been subscribed, have been complied with. The constitutional provision in force at the time of the passage of the said act is as follows:

> "ARTICLE III.—DISTRIBUTION OF POWERS.
>
> "The powers of government shall be divided into three distinct departments, each of which shall be confided to a separate magistracy; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted*." (Const. of 1865, Art. III.)

This provision is identical in language with a like provision contained in the constitution of 1820, and the constitution of 1875, now in force, is substantially the same on this subject. It is as follows:

> "THE DISTRIBUTION OF POWERS.
>
> "The powers of government shall be divided into three distinct departments—legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments shall exercise any power properly belonging to either of the others, *except in the instances in this constitution expressly*

*directed or permitted.*" (Constitution of 1875, Art. III.)

Provisions of like character are found either in the original or subsequently adopted constitutions of all of the states of the Union, with two or three exceptions. They are but amplifications, more or less extended, of one of the fundamental principles which constitute the basis and foundation of republican government in America, and which first found authoritative expression in the declaration contained in the Virginia bill of rights of June 12th, 1776, "that the legislative and executive powers of the state should be separate and distinct from the judicial," which was incorporated in the constitution of that state adopted June 29th, 1776, in language meaning substantially the same as that of the constitution of Missouri.

The line of demarkation between powers executive, judicial and legislative in their character cannot at all times and in all cases be measured with precision. No inflexible rule comprehensive enough in its character can be framed to apply to determine beyond controversy whether in any particular case the boundaries which separate them have been overstepped, or how far one of the great powers of sovereignty has been bestowed upon or has been exercised by officers clothed with the exercise of powers properly belonging to either of the other co-ordinate departments of government.

There are, however, certain general principles, fundamental in their nature and everywhere received without question as embodying the true theory of constitutional law, which can be, and have been, applied by courts and jurists on this subject in the determination of the oftentimes difficult and intricate questions arising in an investigation of this character. They are, that it is the province of the judicial power to decide private disputes and to determine private controversies respecting rights of person and of property. That it is the exercise of judicial power to interpret and administer the laws, and to ascertain, from an examination of testimony, whether the claims of parties, upon the law and the facts as interpreted and ascertained, are founded in right or in wrong. Its pathway lies over broken contracts and violated agreements, and it is the peculiar and exclusive province of the judicial department to adjudicate upon, declare, settle and protect the rights and interests of parties to such contracts and agreements, and to that end to construe and apply the laws of the land.

Cooley Const. Lim., 2 Ed., 90, 91, and cases cited.

The application of these principles to the act of March 30th, 1872, to test its compliance with or its violation of the state constitution in its delegation of the judicial powers above enumerated to the auditor of state, is the task to which we now approach; and we do so feeling the full weight of the responsibility resting upon us in asking this court to declare void a statute of the State as violating the plain provisions of the constitution of the State, in taking away from the courts the determination of the private rights of the citizen and vesting that power in a member of the executive department of the State.

By article five of the state constitution, concerning the executive department, the supreme executive power is vested in the governor, who, with the lieutenant-governor, the secretary of state, state auditor, state treasurer and attorney general, constitute the executive department.

The state auditor is required to "perform such duties as shall be required of him by law."

The state auditor is made by law the general accountant of the State, and the keeper of all public account books, vouchers, documents, bonds and coupons, and all papers relating to the accounts and contracts of the State and its revenues, debts and fiscal affairs. He is required to report to the general assembly, at the commencement of each session, a detailed statement of the condition of the public revenue, public expenditure, public debt, estimates for expenditures required, such plans as he may deem expedient for the support of the public credit, for lessening the public expenses, for promoting frugality and economy in the public offices, and generally for the better management and more perfect understanding of the fiscal affairs of the State. He is the adjuster of all claims against the State payable out of the state treasury; draws all warrants upon the treasury for money; settles and adjusts the accounts of collectors of the revenue and other holders of the public money, who are required to pay the same into the treasury; keeps the accounts between the State and state treasurer, and of all debts and credits between the State and the United States and every other state or person with whom the State may have dealings; directs prosecutions for all delinquencies of public moneys payable into the state treasury, and with the state treasurer constitutes the treasury department of the State. (Gen. Stat. of 1865, Ch. 10, Secs. 1 to 15, pp. 85-87.) He is in every respect an executive officer, and his official character and onerous duties as the accounting officer of the State are wholly repugnant to and incompatible with those of a judicial officer.

By article 6, of the state constitution, the judicial power as to matters of law and equity, is vested in a supreme court, in circuit courts and in such inferior tribunals as the general assembly may from time to time establish.

Is the state auditor required by the act of March 30th, 1872, to exercise powers properly belonging to the judiciary of the State?

The fourth section of that act provides that before any bond thereafter issued by counties, cities or towns, shall obtain validity or be negotiated, it shall first be presented to the state auditor, who shall register the same; and who shall certify by endorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor. This act has been held to apply to township bonds issued after its passage, and the nature of his powers respecting township bonds under this statute can be most satisfactorily ascertained by an examination of the duties devolving upon him in passing upon the validity of the bonds in controversy in this case. He must first ascertain, determine and adjudge the facts that twenty-five persons, who are tax-payers and residents of the municipal township, have petitioned the county court, setting forth their desire as a township to subscribe to the capital stock of the railroad company, that such company is building or proposing to build a railroad into, through or near such township, and the legality of such petition. To enable him to determine and adjudge correctly, evidence, written and oral, must be presented to him and he must judge of its sufficiency. He must also pass upon the terms and conditions of such proposed subscription, the sufficiency and legal effect of the order of the county court calling an election to determine if such subscription shall be made. He must inspect the election returns and determine if a valid election has been had in the matter, and then determine upon the law and the evidence if the order of the county court making the subscription is in compliance with the law and the terms and conditions upon which the subscription was authorized to be made and its acceptance by the railroad company. As has been held by this court, such subscription when made and accepted, becomes a contract between the parties thereto, by which their respective rights, duties and obligations become fixed and vested, and which are beyond impairment by subsequent legislation. But from the examination thus made of the law and of the facts by the state auditor, he can determine and adjudge, without remedy for or appeal from an erroneous decision, that all the conditions of the law have not been complied with in the issue of the bonds thereunder, and refuse to certify to a fact which, from his examination of the law and the facts passed in review before him, his judgment tells him is not true. By the exercise of this power, final and unappealable in its nature, he at once passes upon, interprets and declares the law; settles, adjudicates upon and destroys the rights of one of the parties to a contract which neither state legislation nor state constitution could impair.

Is not this the exercise of power properly and exclusively belonging to the judicial department of the State?

Further: After the parties to the contract have complied with or attempted to comply with the terms and conditions of the contract under which the bonds were ordered to be issued, substantially, in whole or in part, or after they have waived or attempted to waive the performance of conditions which either have become impossible of performance or unnecessary, and the bonds contracted for are submitted to him for registration and certification, the state auditor has the functions of judge and of jury imposed upon him, to hear and determine, from the law and the evidence adduced before him by the respective contending parties, whether the conditions of such contract have been complied with, and to pass upon, adjudicate and settle the rights of the parties to such contract, to the bonds ordered to be issued thereunder. If in the exercise of this judicial power the state auditor should find from the evidence as a matter of fact that the conditions of the contract had not been complied with, and should refuse to embody his judgment in the form of a certificate on the bonds, the right to have and receive the bonds is conclusively settled and adjudged against the railroad corporation.

A breach of contract; a controversy respecting private rights arising out of such contract; an issue raised by conflicting evidence concerning the performance or waiver of conditions and stipulations made by the parties in such contract, are all withdrawn from the cognizance of the courts of justice and relegated to the arbitrament and final decision, if adverse to one of the parties, of the executive officers of the State!

That such are the duties devolving upon the state auditor under this act cannot be questioned. And such seems to be the opinion of this court. In *Anthony v. Jasper County*, 101 U. S., 697, the chief justice there, in delivering the opinion of the court, says:

"The act now in question * * in effect provides that no bond issued by counties, cities or incorporated towns shall be valid, that is to say completely executed, until it has been countersigned or certified in a particular way by the state auditor. For this purpose, after being executed by the corporated authorities, it must be presented to that officer, *and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed*, and whether *all the conditions of the contract in consideration of which it was to be put out have been complied with. If he is satisfied, the registry is made and the requisite certificate endorsed on the bonds.*"

See also to the same effect *Lewis v. Commissioners*, 105 U. S., 749.

But if the state auditor is not satisfied, what then? One of the parties to the contract, the party who alone is interested in having the bonds registered and certified, so as to receive the fruits of the contract under which the work and labor were performed and materials furnished, is deprived of all rights under the contract and of all remedies for their enforcement in a court of justice. Because it is absolutely certain that the power to pass upon and determine the questions of law and of fact necessarily considered by the state auditor in satisfying himself that the conditions of the law and the conditions of the contract have been complied with, is either judicial or executive in its character. If it is power properly belonging to the executive department, and therefore properly exercised by the state auditor, it is not judicial power, and by the express inhibition of the constitution the judiciary are prohibited from its exercise; and the courts cannot exercise this executive power for the state auditor, or compel him to act otherwise than to exercise it in accordance with the convictions of his own judgment, formed from an examination made by him under the registration law, of the law and evidence concerning the issue of the bonds, the validity of which he is called upon to ascertain and determine.

If this power to thus adjudge the law and the fact is in its nature essentially judiciary power, then the exercise of it properly belongs to the judicial power alone, and all assumption of it by the state auditor, under the law, is expressly prohibited by the constitution of the state and is void.

It necessarily follows, therefore, that the judgment of the state auditor that the conditions of the law and of the contract under which the bonds are ordered to be issued have not been complied with, is final and conclusive. The law makes no provision for an appeal from, or for any review by other tribunal, of this decision. The bonds are left without any legal validity, cannot be negotiated and create no legal liability against the municipality by which they are executed.

It cannot be claimed that there is anything in the character of the contracting parties that withdraws the contract of a municipal corporation of subscription to the capital stock of a railroad company from the operation of the same principles that govern and control contracts and agreements of private individuals. When any municipal corporation, under authority of law, enters into contracts with private individuals or private corporations, by which property obligations are created and property rights become vested, it, for that purpose, puts off its attributes of sovereignty and stands on the same plane of equality with the other contracting parties. It is entitled to the same rights of enforcement and to the same compensation for violations of the conditions of such contracts as are given to the humblest citizen in like cases; and it is responsible in courts of conscience if not of law, for all breaches of the same, and liable to the same remedies for their enforcement in like manner as private individuals.

What remedy in such case can be afforded to the injured party by a judicial tribunal? The railroad corporation may bring an action in due form and in the proper judicial forum, against the municipal corporation, and may produce proofs satisfactory to court or jury that the contract of subscription is valid and binding, that its terms have been complied with, and that it is entitled to the bonds voted in payment of such subscription; and the jury may so find or the court so adjudge. But can this judgment of the court be substituted for the judgment of the state auditor? Can the state auditor be compelled by mandamus or otherwise to reverse his judgment; to abdicate his judicial functions; to register and certify the bonds as valid and binding obligations, because the opinion of an independent co-ordinate department of the state government is in opposition to his own opinion, deliberately formed, it may be, on the same state of facts? If the state auditor erred in his interpretation of the law governing the issue of the bonds, it might be that a judicial construction of it would be binding upon him; but in his application of the law to the facts involved and the performance of the conditions of the law and of the contract, his decision is not subject to the control of any other tribunal, and there is no power anywhere lodged in the courts to compel him to revoke it. He is not compelled to take the opinions of the judges of the courts or of any other person; for the legislature relied upon his judgment and opinion, and not upon the opinion or judgment of any other person or tribunal, in this matter. Mandamus may lie to compel him to act; but what action he shall take must be left to the dictates of his judgment.

In the discussion of the question whether an executive officer of a state is subject to the writ of mandamus, the distinction between acts purely ministerial, about which he has no discretion, but is required by law to do them, and those in the performance of which his discretion or judgment is to be exercised, is constantly taken. The performance of one class of these duties may be enforced by mandamus, whilst the other, it is conceded on all hands, is of such a character that its performance cannot be compelled by the courts.

*Pacific Railroad v. Governor*, 23 Mo., 360.

Though mandamus may sometimes lie against an executive officer to compel him to perform a mere ministerial act required of him by law, yet such an officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions.

*United States v. Seaman*, 17 How., 230.

*United States v. Guthrie*, Id., 304.
*Commissioner v. Whitely*, 4 Wall., 522.
*United States v. Commissioner*, 5 Wall., 563.
*The Secretary v. McGarrahan*, 9 Wall., 312.
*Griffith v. Cochran*, 5 Binney, 87.
*Hull v. Supervisors*, 19 Johns., 259.
*State ex rel. Bartley v. Governor*, 39 Mo., 397.

It is true the act further provides that the certificate shall be *prima facie* only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving to the contrary in any suit or proceedings to test or determine the validity of the bonds.

After the state auditor has acted *in favor* of the validity of the bonds, and has made registration and granted his certificate thereof, then his action *in that regard* is made subject to examination and revision in a subsequent judicial proceeding; but after he has acted *against* the validity of the bonds, and has refused registration and certification thereof, his action *in that regard* cannot ever after be questioned. Until the bonds are registered and certified the courts must hold them as creating no legal liability, and no evidence would be admissable in any suit or proceeding affecting them to show that they were fully within the conditions of the law and the contract, and were in all other respects legal and valid obligations.

These considerations respectfully urged, are, we think, conclusive to show that the power given to the state auditor to forever determine and destroy the rights of the parties to a contract of this character is from its very nature judicial, involving as it does an inquiry into questions of law and of fact, and affecting the property rights of the parties thereto.

A judicial power can mean nothing more or less than the power which administers justice to the people according to the prescribed forms of law, according to their rights as fixed by law. Whatever power in a state renders judgments, sentences and decrees between parties, is called the judicial power; no matter whether the sentence, judgment or decree arises out of a contract or from the violation of a criminal statute; or because one of the parties has broken his contract with the other, or beat him; taken unlawfully his property; slandered his character; trespassed on his lands, or been guilty of fraud and deceit. This power is properly lodged in courts of justice, and is to be exercised according to the laws of the land previously enacted. The legislature is clothed by the constitution with the power to make, the judiciary to declare, and the executive to enforce the laws.

These powers of government ought to be forever separate and distinct. They are so required by the constitutions of Missouri of 1820, 1865 and 1875; and the language of the constitution of Massachusetts of 1780 may well be applied to the settled policy of Missouri, as of all the other states of this Union, that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; TO THE END THAT IT MAY BE A GOVERNMENT OF LAWS AND NOT OF MEN."

## IV.

The registration act of March 30th, 1872, if construed so as to apply to the bonds in controversy, voted by the township and subscribed by the county court and accepted by the railroad company prior to its passage, impairs the obligation of the contract of subscription so made and accepted, and in payment of which subscription said bonds were executed and delivered, and is, therefore, as applied to these bonds, void under the operation of that provision of the constitution of the United States and the constitution of the state of Missouri forbidding the passage of any law impairing the obligation of contracts.

It would seem desirable at this point to first consider the precise relation and situation of the parties to these bonds, from the inception of the transactions which led to their issue down to the passage of this act for the registration of bonds, so that we may correctly interpret the facts found by the court below and contained in this record.

The Atlantic & Pacific railroad was then being operated, and had been running west from St. Louis to southwest Missouri, passing to and through the town of Pierce City, lying in the adjoining county, east of said Jasper county, and situate twenty-six miles east of Carthage, in said Marion township, and from this town of Pierce City said Atlantic & Pacific railroad, in going west, took a continued southwesterly direction, passing to the left and south of Carthage, on to the town of Vinita, in the Indian Territory.

At this time the Kansas City, Fort Scott & Gulf railroad was running and in operation south from Kansas City to Columbus, Cherokee county, Kansas, which last county adjoins Jasper county, Missouri, on the west, Columbus, Kansas, being about thirty miles west from Carthage, Mo.; but at that time Carthage, although the largest town between Pierce City, Mo., and Columbus, Kansas, was without any railroad, and no line of railroad ran through the county of Jasper, now the fourth county in population and wealth in the state of Missouri. Under these circumstances the Memphis, Carthage & Northwestern Railroad Company, to which these subscriptions were afterwards made, was organized in the summer of 1871 to build a railroad from Pierce City, on the Atlantic & Pacific railroad, west twenty-six miles to Carthage, where the headquarters of the new company was located and its president resided, so that Carthage, Marion township and Jasper county might have an outlet to St. Louis.

Shortly after this the line of this new road was extended, by proper action under the laws of Missouri, west from Carthage to Columbus, Kansas, to connect with the K. C., Ft. S. & G. R. R., and in November, 1871, as we have seen, a subscription and issue of bonds in the sum of $50,000 was made by defendant county for said Marion township, of which said city of Carthage has always constituted much the larger part, to said company to aid in the home enterprise of building said railroad through said city of Carthage, said township of Marion and said county of Jasper for whose benefit the line of road was originally designed. Those bonds were put upon the market and sold at the time of their issue, but being insufficient with the other means at hand to complete the road so that the city of Carthage and the county of Jasper might obtain the much-desired railroad connections with St. Louis and Kansas City, proceedings were taken which resulted in the issue of the bonds in controversy in this case. Accordingly on February 10th, 1872, as the record shows, (*ante*, p. 3,) a petition of the tax-payers of said township, as required by the township-aid act of March 23d, 1868, for another subscription to said company was presented to the Jasper county court, whose sittings were at Carthage, the county seat, and on the same day—viz: February 10th, 1872,—the county court ordered an election to be held in the township to determine whether the additional subscription should be made.

The election was held on March 5th, 1872, and, like the former subscription and issue of bonds, the bonds proposed by the new subscription were voted by more than two-thirds of the voters of the township. On March 28th, 1872, the county court met, and, having canvassed the vote, made the order of subscription as required by the voters and the provisions of the township-aid act, in the following language:

"And wherefore, it is ordered by the court that the sum of seventy-five thousand dollars be and is hereby subscribed to the capital stock of said railroad company, in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court and attested by the clerk of this court, with the seal of this court affixed."

*On the same day that this order of subscription was made by the county court—viz: March 28th, 1872, —the subscription was accepted by the company to which the subscription was made.* This is shown by the second paragraph of the findings of the court below, (*ante*, p. 5,) which is in the following words:

"March 28th, 1872, the county court of Jasper county, pursuant to the general statute of the State of Missouri entitled 'An act to facilitate the construction of railroads in the State of Missouri,' approved March 23d, 1868, and pursuant to the vote of two-thirds of the qualified voters of said Marion township assenting thereto at a special election, subscribed to $75,000 of the capital stock of the Memphis, Carthage & Northwestern Railroad Company, a corporation organized and existing under and in pursuance of the general statutes of the state of Missouri; *and said corporation accepted said subscription of stock then and there*, by its terms payable in the bonds of said township, and by virtue of said subscription and a prior subscription caused said township to be and appear upon its stock-transfer book as the holder and owner of 1,000 shares of stock, amounting in the aggregate to $100,000, which it still continues to hold."

It is thus distinctly found by the court below that this subscription was made by the county court and accepted by the railroad company on March 28th, 1872. There was nothing unreasonable or unnatural in this acceptance of the subscription taking place at the same time the subscription was made. The bonds were not to be issued except as the work progressed on the road, and it was doubtless thought prudent by the president of the railroad company to at once accept the subscription made, so that the township and county court could not recede therefrom, and so that the company could, in advance, safely rely on the bonds being executed and delivered to aid in the building of the road. This becomes still more manifest when the fact is considered that was passed upon by this court in the case of *Burgess v. Seligman*, 107 U. S., 20, where the transactions of this company in a contest between Burgess, the contractor who built the road, and the Seligmans, as its stockholders, were reviewed, viz: That the company was paying its contractor for the road bed and ties solely in municipal bonds, and that, aside from the Seligmans, the townships who made stock subscriptions to the company were, with a very few exceptions, the only persons who appeared upon its books as its stockholders. How natural and business-like, therefore, it was for the railroad company, which had its chief office at Carthage, where the county court was held and where this subscription was made, to at once accept the subscription then made, as testified to in the court below by the president of the company, who, as a resident of

Carthage, could have gone from the office of the company to the county-court room in a few minutes after the order of subscription was made, if, indeed, he was not present in court when the subscription was ordered by the court.

We do not refer to these considerations to impeach the record in this cause, but rather to support the finding of the court below contained therein, that the subscription was accepted on March 28th, 1872, the day it was made, and to enable this court to see the precise situation of the parties at the time the subscription was made and accepted, and before the passage of the act of registration.

After the subscription was made and accepted the court below finds that the company "by virtue of said subscription and a prior subscription caused said township to be and appear upon its stock-transfer book as the holder and owner of 1,000 shares of stock, amounting in the aggregate to $100,000." As before stated, a prior subscription and issue of bonds amounting to $50,000 had been made by this township to the company in November, 1871, and when this second subscription was made for $75,000 the township was placed upon the company's books "as the holder and owner of 1,000 shares of stock, amounting in the aggregate to $100,000." The two subscriptions amounted to the sum of $125,000, but the township was only placed on the company's books at that time as the holder of shares amounting to $100,000. The reason for this, as we understand, was, that of the last subscription of bonds for $75,000 the sum of $25,000 was to be used in the construction by the company of machine shops at Carthage after the completion of the road, while the remaining $50,000 of the last subscription was to be used in the building of the road itself, as the first $50,000 of bonds issued in November, 1871, had been used. The entire subscription of $75,000 was accepted the day it was made, and for the $50,000 thereof which was to be used in the construction of the road through the township, the township was at once placed upon the stock books of the company as a full and absolute stock subscriber and stockholder, and hence entitled to all the rights and privileges of a member of the company. And, as respects the last $50,000, the township was treated, from the time of the last subscription, as a full stockholder by the company, the same as it was treated as respects the first issue of bonds which had already been executed and delivered. The minds of the parties had met and agreed as respects the bonds in controversy, the subscription was not only made and accepted on March 28th, 1872, but the township then became a stockholder for the full sum of "$100,000, *which it still continues to hold*."

Let us here consider the legel effect of the stock subscription thus made and accepted on March 28th, 1872, and the legal rights of the parties resulting therefrom. Fortunately on this point the clear and emphatic decisions of this court definitely fix the legal effect of the subscription and the rights of the parties thereto. We will refer to two only of those cases.

The case of *County of Moultrie v. Savings Bank*, 92 U. S., 632, is the best and most fully considered one, and very closely resembles this case. In that case this court used the following language:

"In the present case the authority exercised was given to the county by the act of March 26th, 1869, incorporating the railroad company. The tenth section of the act was as follows:

"'The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company, to an amount not exceeding $80,000, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent per annum, said bonds to be issued in such denominations and to mature at such times as the board of supervisors may determine; *provided*, that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid.'

"No approving popular vote was required.

"It is not to be doubted that this section gave to the county complete authority to make a subscription to the capital stock of the company. *The power was fettered by no conditions or limitations, except as to the amount which might be subscribed; but the payment of the subscription was directed to be postponed until the railroad should be opened. And, of course, as a greater power includes every constituent part of it, the legislative act empowered the board of supervisors to agree to subscribe preparatory to an actual subscription.* The power thus granted was never revoked, unless it was by the new constitution of the state, which did not take effect prior to July 2d, 1870. Whatever was done in pursuance of the power before that time, if anything was, could not be affected by the constitution, subsequently adopted. *Subscriptions or contracts to subscribe,* made in pursuance of it before it was abrogated, remained binding; for a constitution can no more impair the obligation of a contract than ordinary legislation can. It must be conceded that, *had no subscription been made, or engagement to subscribe entered into,* before the new constitution took effect, none could have been made after. But the special finding of facts shows that one was made in 1869. On the 16th of December of that year, the board of supervisors met and informally resolved to subscribe $80,000 to the capital stock of the railroad company, and the resolutions were referred to a lawyer to be put in form before being recorded on the records of the board. They were accordingly prepared from minutes furnished by the chairman of the board, and entered by the clerk upon the records as of the date of the December meeting of the board, and duly attested. This must have been done prior to the first Tuesday in March, 1870. The record, as it appears under date of December 14th, 1869, is as follows:

"'And it is further ordered by the board of supervisors of Moultrie county, that, under and by virtue of the authority conferred upon said board by an act approved March 26th, A. D. 1869, entitled, 'An act to incorporate the 'Decatur, Sullivan & Mattoon Railroad Company', the county of Moultrie subscribed to the capital stock of the Decatur, Sullivan & Mattoon Railroad Company the sum of $80,000, to aid in the construction of a railroad by said company in pursuance of their charter.

"'And be it further ordered by the board of supervisors aforesaid, that, when said railroad shall be open for traffic between the city of Decatur and the town of Sullivan aforesaid, there be issued $80,000 of the bonds of said county, in denominations of not less than $500, payable to said company, drawing interest to be paid annually, at the rate of eight per cent per annum; the principal to be due and payable ten years after date, or sooner, at the option of the county; and that said bonds be delivered to said railroad company in full payment of the subscription of said county, so made as aforesaid.'

"It is true there was no further order of this board to enter the resolutions of record, but it was the clerk's duty to make the entry. The substance of them had been adopted. They required no further action except to put them in form. No further action appears to have been contemplated. They remain of record still, and the board has never taken any action to correct the record. On the contrary, it has been recognized by subsequent action.

"At the December meeting of 1872, a special committee was appointed to examine the records of subscriptions of railroad donations and report. The committee did report on the 25th of December, 1872, that the subscription of $80,000, under the act of the general assembly of March 26th, 1869, to aid in the construction of the Decatur, Sullivan & Mattoon railroad, was in accordance with law. Under this action of the board, and the report of the committee, the bonds were delivered. *It is impossible, therefore, to doubt that the resolutions adopted in December, 1869, as recorded, must be treated as the action of the board at that time. And, if so, they amounted to a subscription to the stock of the company, and created an obligation for the payment of the subscription in county bonds.*

"It is true no subscription was made *on the books* of the railroad company until July, 1871, when one was made by Mr. Titus, chairman of the board, without any express authority, and then made for the purpose of enabling him to vote at an election. But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869.

"The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract; or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it.

The resolution to subscribe was its own act; its immediate subscription. (*Western Saving-Fund Society v. The City of Philadelphia*, 31 Penn. St., 174; *Sacramento v. Kirk*, 7 Cal., 419; *Logansport v. Blakemore*, 17 Ind., 318.)

In the *Justices of Clarke County v. The Paris, Winchester and Kentucky River Turnpike Company*, 11 B. Mon., 143, it was ruled that an order of the county court, by which it was said the court subscribed, on behalf of Clarke county, for fifty shares of stock in the turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company, but the court of appeals said: 'We cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and, in substance and legal effect, subscribing for that number of shares.' So in *Nugent v. The Supervisors of Putnam County*, 19 Wall., 241, it was said that to constitute a subscription by a county to stock in a railroad company it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription.

And if this conclusion could not be reached, it would make but little difference to the present case, for it could not be doubted that *the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company.* The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment for the subscription by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. *No matter whether the contract was a subscription or an agreement to subscribe, it was not unnulled or impaired by the prohibition of the constitution.* The delivery of the bonds was no more than performance of the contract. For these reasons it is in vain to appeal to the decisions made in *Aspinwall v. The County of Davies*, 22 How., 364, and *Town of Concord v. Portsmouth Savings Bank, supra*, p. 625. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board of supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. *The operation of the constitution was only prospective.*"

And in the case of *County of Clay v. Society for Savings*, 104 U. S., 590, this court said:

"These transactions made a contract between the county and the railway company to the effect that in consideration that the railway company should construct its road upon the line designated and complete it and have the cars running thereon between the points mentioned, the county would deliver its bonds to the railway company in satisfaction of its donation. This contract had been partly performed by the railway company before the constitution of 1870 went into effect. The adoption of the constitution could not annul or impair it. The county was bound notwithstanding the provision of the constitution of 1870."

This was a case of pure donation of the bonds to the company, and not a subscription to the stock of the company.

By the order of subscription of the bonds in this case made and accepted March 28th, 1872, and which under these authorities became the binding contract of the parties, the company became entitled, as the work of building the road should be completed, to receive the bonds of the county for the township which, when signed and delivered by the presiding justice and clerk of the court with the seal affixed, as stipulated by the accepted order of subscription, would be negotiable instruments, and, as such, pass in the markets of the world. Nothing more than this was required by the law in force when the subscription of these bonds was made and accepted, to make the bonds valid, and it is not pretended that the bonds are void in the hands of their holders under the law as it existed on the day of the contract of subscription.

Does the registration act of March 30th, 1872, impair the obligation of the previously accepted contract of subscription under which the railroad company, according to the law then in force, became entitled to receive, and the municipality became bound to pay, the bonds of the township which should be valid and negotiable when signed by the presiding justice and clerk of the court, with the seal affixed? Much of the argument on the last branch of the case as to vesting the state auditor with judicial power is applicable on this point.

The fourth section of the registration act provides in effect that the bonds shall not be valid or negotiable, although otherwise properly signed, unless they are submitted to the state auditor with the law and the evidence adduced by the parties as to their compliance and non-compliance with the terms of subscription, and the auditor after examining the law and the evidence adjudges the bonds to be valid and so certifies.

As we have already seen, there is no power to control the discretion of the state auditor in making his decision. He cannot be compelled by mandamus, against his judgment, to register the bonds, although the court asked to award the writ against him may be satisfied by incontestible proof that in the issue of the bonds both the law and the terms of subscription have been complied with. Although the law and the contract may have been complied with fully, no court of common law can award damages for a breach of the contract to deliver the bonds, and no court of chancery can compel specific performance, for the reason that the power to pass upon all the questions, both of law and fact, in the issue of the bonds is solely confided to the state auditor, whose decision refusing registration of the bonds is final and everywhere conclusive, and from whose decision there is no appeal. Nor is the state auditor, although proceeding judicially on a consideration of the law and the evidence, invested with the usual power to grant a new trial if he has made a mistake in the trial of any of the questions of law or fact, or if newly discovered evidence that would change the result is produced before him. His decision once made refusing registration of the bonds is an end of the matter, and no power on earth, not even the consent of both parties to the bonds, can change or destroy the conclusive effect of his decision adjudging the bonds to be void and therefore not subject to registration.

Neither the accepted contract of subscription nor the law then in force, which was a part of the contract, contemplated any such proceeding as is required by this act before the state auditor, and the railroad company had the right to receive the bonds when they should be issued and delivered, without compliance with this requirement. If the legislature had the right, as respects the bonds in this case, to require that before they should be valid they should be passed upon by the state auditor, it had the same right to pass a law that the bonds should be first approved by the legislature itself, or the sheriff of Jasper county, or that the bonds should be absolutely void. For if the legislature may put it beyond the power of the parties to a contract already made to carry it into execution, unless some third party first pass upon and approve it, it may decree that the contract, notwithstanding the will of the parties, shall be absolutely null and void. If the legislature may impair the obligation of a contract, it may destroy it altogether. The extent to which a law impairs the obligation of a contract is wholly immaterial.

*Edwards v. Kearzey*, 96 U. S., 595.
*Von Hoffman v. Quincy*, 4 Wall., 535.

The power to impair carries with it the power to destroy.

The case of *McCauley v. Brooks*, 16 Cal.. 28, decided by Chief Justice Field, very closely resembles this case, and is decisive of the principle for which we contend. In that case it appeared that on March 26th, 1856, a contract was made between the state of California and the assignor of the plaintiff for the leasing of the state penitentiary for five years, the state to pay the lessee $10,000 each month for his services, which was to be paid by warrants drawn by the controller on the state treasurer, pursuant to the provisions of an act of the legislature of that state approved March 21st, 1856, and in force when this contract of lease was made. The lessee brought this proceeding in 1860 for a mandamus against Brooks as controller to compel him to issue a warrant for $270,000, which was the amount due under the lease for the period commencing December 26th, 1857, and ending March 26th, 1860; and Brooks defended on the ground that by an act passed by the legislature April 16th, 1856, which was but a few days after the lease was made, it was required that all demands against the state, except for salaries of officers, must receive the approval of the board of examiners before warrants could be issued for them by the controller, which requirement the plaintiff had not complied with. To this the plaintiff replied that said act of April 16th, 1856, was unconstitutional and void because it impaired the obligation of said contract of lease, and in passing upon the question thus raised Chief Justice Field, who delivered the opinion of the court, and who sustained the point thus made by the lessee against the law, made use of the following language:

> "In respect to the payments to be made by the state, the contract purports to express the exact terms of the act. It contains the covenant of the state to pay the lessee at the end of each month during the continuance of the term the sum of $10,000; the same "to be paid in conformity with the law creating said board of commissioners and defining their powers and duties." That law makes the appropriation for the monthly installments as they respectively become due, requires the controller to draw his warrants for the same and directs the treasurer to pay them on application at the end of each month.
>
> "The absolute right to warrants thus secured cannot be changed by any subsequent legislative enactment into a right dependent for its enjoyment upon the will and discretion of any board established by the state.
>
> "The legislature might as well make the issue of the warrants depend upon the approval of any or every officer of the state—of the sheriff of Klamath, or the judge of Nevada, or the mayor of Los Angeles or even upon a popular election.
>
> "The imposition of any conditions not provided by the terms of the original contract is not within the constitutional power of the legislature. Any law attempting to make such imposition is invalid as impairing the obligation of the contract."

Thus far we have considered the effect of section four of the act of registration in cases where the state auditor refuses registration of the bonds. But what is its effect where he finds that the law and the conditions of the subscription have been complied with, and he accordingly registers and certifies the bonds. Said section four provides that the auditor "shall certify by endorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor."

Then follows the following language:

> "*But such certificate shall be prima facie evidence only of the facts therein stated*, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceedings to test or determine the validity of such bonds, or the power of any county court, city or town council or board of trustees or other authority to issue such bonds."

It follows from these provisions of said section four that the auditor is required, where he registers and certifies the bonds, to preserve in his office the evidence on which he finds the terms of the subscription of the bonds have been complied with; that his certificate on the bonds that the terms of their subscription have been complied with is only *prima facie* evidence of that fact, and that such compliance may be questioned in any suit which may be brought on the bonds. What is the effect of this provision of section four of the registration act on the bonds in this suit, except to destroy the most valuable element in the contract of subscription made and accepted by these parties before the passage of that act?

The important and most valuable part of the accepted contract of subscription, so far as the railroad company is concerned; was that part which provided for the issue of bonds in payment of the subscription. And the general law of the land, so long recognized by this court and the courts of the different states, that bonds such as were contracted to be issued by this accepted contract of subscription are negotiable instruments and therefore conclusive, when negotiated, of all the facts that are necessary to their validity, entered into and formed a part of that contract of subscription when made and accepted. So that when this contract was made it was agreed as a part of that contract that the bonds to be issued in payment of the subscription should be negotiable and therefore conclusively valid in the hands of every holder to whom they should be negotiated and sold in the markets of the world. But the registration act puts an end to this feature of the contract, if the act is valid and is applicable thereto, for it provides that to be valid and negotiable the bonds must first be registered with the state auditor, and then provides that if registered they shall only be *prima facie* evidence in the markets of the world of their validity.

What kind of an instrument is that which, while being fully possessed of all the elements of negotiability, is only *prima facie* evidence of its own validity? Is it not the chief and distinguishing feature of negotiability that the instrument is conclusive in the hands of every holder to whom it has been negotiated of the liability thereon of its maker? It is a contradiction to say that an instrument is negotiable and yet is only *prima facie* evidence of its own validity. We submit that as respects the bonds and coupons in controversy in this case, said act of registration is clearly void as impairing the obligation of the contract of subscription in payment of which they were issued.

## V.

The court finds in this case that the railroad, to aid in the building of which these bonds were issued, was completed before the bringing of this suit, and is in constant operation. It was not built within the time stipulated for, but time was not made the essence of the contract, and no advantage has ever been taken or forfeiture declared because the road was not completed within the time agreed upon. There is no finding by the court that the terms of the subscription were not complied with, and non-compliance is a defence which defendant should have established.

*Lincoln v. Iron Co.*, 103 U. S., 416.
*Clay County v. Savings Society*, 104 Id., 586.

In this connection we call attention to the fact that the order of submission of this subscription to the voters made February 10th, 1872, by the Jasper county court, and which contains the terms of the subscription was in some way omitted from the finding of facts in this case by the court below. That order may be found at page 138 of volume 4 of Dillon's Circuit Court Reports, where the finding of facts in

*Anthony v. Jasper County* is set out in full. If it should be desired to consider that order of February 10th, 1872, as a part of the findings of facts in this case, we here consent that the same may be done. The court below found that plaintiff is a *bona fide* holder for value of the bonds and coupons in controversy, and the bonds contain the following recital:

> "This bond is issued pursuant to an order of the county court of the said county of Jasper, made by authority of an act of the general assembly of the state of Missouri entitled 'an act to facilitate the construction of railroads in the state of Missouri,' and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township."

In view of this recital in the bonds and of the fact that plaintiff is a *bona fide* holder of the bonds, whose assignor bought them on the faith of this recital and the assurance of the county clerk in his letter of November 3d, 1872, that taxes had been levied and were being collected to pay these coupons, and of the fact that the registration act does not apply to this case, it would not be a good defence to show, if that were the fact, that the terms of the subscription, as shown by said order of February 10th, 1872, had not been complied with. But no such showing is made. On the contrary the court finds that the road for which the bonds were voted has been completed and in constant operation, thereby giving the voters the railroad connections with St. Louis and Kansas City which they so much desired. The county court of Jasper county made levies of taxes in 1872, 1873 and 1874 to pay the coupons detached from these bonds, and directed the county treasurer to send the taxes to the National Park Bank of New York, the agent of the company, to pay the coupons.

This shows that the court concurred in the issue of the bonds by the presiding justice and clerk, if such concurrence was necessary. But the accepted order of subscription ordered and provided that the bonds should be signed by the presiding justice and clerk of the court, and no further concurrence or action of the court was necessary. There was another order made by the county court on June 4th, 1872, which was omitted in the finding of facts in this case on which reliance may be placed by the other side. That order is on page 140, of 4th Dillon's Circuit Court Reports, and orders that the clerk have the bonds in controversy registered.

If the legislature, after the making and acceptance of the subscription of the bonds on March 28th, 1872, could not, by the registration act, order the bonds which were to be issued in payment thereof to be registered, the Jasper county court could not so order without the company's consent; and as there is no pretence of such consent having been given that the bonds should be registered, it follows that said order of June 4th, 1872, is a nullity. If so desired, we consent that said order of June 4th, 1872, be considered a part of the findings in this case. The orders of the county court dated February 10th, 1872, and June 4th, 1872, to which we have referred above, and which we have consented may be made a part of this record, are the only points in the findings in *Anthony v. Jasper County*, not covered by the findings in this case.

The court here finds that there was an accepted subscription before the passage of the act of registration. In that case the record on that point was silent. The bonds were dated the day they were subscribed, viz: March 28th, 1872, which accords with the usual custom and practice. It is the general practice, as we understand, in the issue of government bonds, state, railroad, municipal and corporation bonds, to date the entire issue as of some date prior to their delivery, and there is nothing either suspicious or unlawful in such ante-dating. *Flagg v. Palmyra*, 33 Mo., 440. The bonds in this case were issued in entire good faith, and there is nothing to show that there was anything fraudulent, either in the circumstances of the dating or delivering of the bonds. They were not subject to the act of registration, and it is, therefore, wholly immaterial when they were dated or issued.

It is wholly immaterial when Merwin became presiding justice of the county court, if he was presiding justice when he signed the bonds and when they were delivered. That he was presiding justice of the court when the bonds were signed and delivered is not controverted. He was a member of the Jasper county court all through the year 1872, and when the order of February 10th, 1872, was made and the order of subscription was made and accepted March 28th, 1872.

In 1872 one justice of the county court was the same in rank as another. The law then in force (1 Wag. Stat., p. 439, sec. 1) provided that "the county courts shall be composed of three members, to be styled 'the justices of the county court.'"

And by virtue of section 25 of article v. of the constitution of 1865 "the justices of the county court" were commissioned *as such* by the governor. There was no such officer then known to the law as presiding justice of the county court, but by section 12 (page 441 of 1 Wagner's Statute) then in force, it was provided that "the justices of the county court or a majority of them shall choose one of their members to be president of the court, and, in case of his absence, may apppoint a president *pro tempore*." In *Anthony v. Jasper County*, 101 U. S., 694, the chief justice says:

> "John Purcell was the presiding justice of the court in March. He continued in office until September, 1872, when he resigned, and R. S. Merwin was appointed in his place October 21st, 1872."

The erroneous inference from this statement is that Merwin did not become a member of the court until October 21st, 1872. This was the understanding of Gen. Henderson in arguing before this court the case of *Lincoln County v. Douglass*, for on page eleven of his brief in that case he says:

> "In Anthony's case the bonds were not really signed by the officers of the court until after October the 21st, 1872. The presiding judge who signed them as such was not a member of the court until the latter date."

The statement of the chief justice and the above inference of counsel drawn therefrom are entirely erroneous, for Merwin had been a member of the court during the entire year. Of course, the bondholder who bought these bonds in the markets of the country was not required to go to Carthage and go through the county court records to ascertain which member of the court presided over it at any particular time. This principle was distinctly and repeatedly adjudged by this court in the Kansas bond cases in 92 U. S. Rep., where it was adjudged that the bondholder was not required to consult the county tax rolls to see whether the issue of bonds exceeded ten per cent of the property of the county. When, therefore, the bonds were put upon the market with their recitals, signed by Merwin, a justice of the court during the entire year, and also signed by the clerk with the seal of the court affixed, the bondholder was required to look no further. Besides the county court has subsequently and repeatedly ratified his acts and adopted his signature. But Merwin was in point of fact presiding justice when the bonds were issued, and that was sufficient.

We make no point in this case on the principles adjudged by this court in *Anthony v. Jasper County.* The judgment in that case was concurred in by five justices, three justices dissenting, and Justice Hunt not sitting. The decision was thought by many to be inconsistent with the long line of bond decisions by this court, and took not a few by surprise. But we place this case on grounds which did not arise on the record in that case, and which were, therefore, not considered by counsel or court. Our position here is that the act of March 30th, 1872, on the grounds stated in the third assignment, is absolutely void, and that on the other assignments it does not apply to the issue of bonds in controversy, which were voted and subscribed, and the subscription accepted, prior to that act; and that, therefore, the bonds should be adjudged valid and the judgment below reversed.

The people voted the bonds, and, having obtained the road to the great benefit of the city, township and county, should now pay the obligations they honestly and lawfully made and put upon the markets and sold to the *bona fide* holders who now hold the same.

JAMES S. BOTSFORD,
MARCUS T. C. WILLIAMS,
For the Plaintiff in Error.